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# REVISED CODES OF MONTANA

## VOLUME 7

### 1977 Cumulative Supplement

#### *Containing*

AMENDMENTS TO ACTS AND NEW LAWS ENACTED BY THE  
LEGISLATIVE ASSEMBLY SINCE PUBLICATION OF  
REPLACEMENT VOLUME 7 OF THE  
1947 REVISED CODES

#### AND

ANNOTATIONS SUPPLEMENTING REPLACEMENT VOLUME 7  
THROUGH VOLUME 557, PACIFIC  
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#### *Edited by*

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## CHAPTER 1—COURTS OF JUSTICE, OF RECORD AND OF IMPEACHMENT

Section 93-102. Courts of record.  
93-104. Jurisdiction.

**93-102. (8785) Courts of record.** The court of impeachment, the supreme court, the district courts, and the municipal courts are courts of record.

**History:** En. Sec. 3, C. Civ. Proc. 1895; re-en. Sec. 6239, Rev. C. 1907; re-en. Sec. 8785, R. C. M. 1921; amd. Sec. 11, Ch. 429, L. 1977. Cal. C. Civ. Proc. Sec. 34.

### Repealing Clause

Section 12 of Ch. 429, Laws 1977 read: "Section 11-1709, R. C. M. 1947, is repealed."

### Amendments

The 1977 amendment substituted "The court of impeachment, the supreme court, the district courts, and the municipal courts" at the beginning of the section for "The courts enumerated in the first three subdivisions of the last preceding section, and only those courts."

### Effective Date

Section 13 of Ch. 429, Laws 1977 provided the act should be effective on its passage and approval. Approved April 19, 1977.

**93-104. (8787) Jurisdiction.** The court has jurisdiction to try impeachments presented by the house of representatives.

**History:** En. Sec. 7, C. Civ. Proc. 1895; re-en. Sec. 6241, Rev. C. 1907; re-en. Sec. 8787, R. C. M. 1921; amd. Sec. 1, Ch. 5, L. 1973; amd. Sec. 28, Ch. 309, L. 1977. Cal. C. Civ. Proc. Sec. 37.

cers; deleted "except justices of the peace" following "judicial officers"; and substituted "felonies" for "high crimes."

### Amendments

The 1973 amendment substituted "executive officers, heads of state departments" for a reference to other state offi-

The 1977 amendment deleted "of the governor, executive officers, heads of state departments and judicial officers for felonies and misdemeanors or malfeasance in office" at the end of the section; and made minor changes in phraseology and punctuation.

CHAPTER 2—SUPREME COURT

- Section 93-201. Justices—number increased to five—election and term of office.  
 93-212. Decisions to be in writing.  
 93-219. Justice or judge not to run for office—resignation required.  
 93-232. Expenses of members of commission.

**93-201. (8790) Justices—number increased to five—election and term of office.** The supreme court consists of a chief justice and four associate justices, who are elected by the qualified electors of the state at large at the general state elections next preceding the expiration of the terms of office of their predecessors, respectively, and hold their offices for the term of eight (8) years from and after the first Monday of January next succeeding their election.

**History:** En. Sec. 12, C. Civ. Proc. 1895; re-en. Sec. 6244, Rev. C. 1907; amd. Sec. 1, Ch. 31, Ex. L. 1919; re-en. Sec. 8790, R. C. M. 1921; amd. Sec. 1, Ch. 13, L. 1973. Cal. C. Civ. Proc. Sec. 40.

**Amendments**

The 1973 amendment increased the term

of office from six to eight years; and made minor changes in phraseology.

**Repealing Clause**

Section 2 of Ch. 13, Laws 1973 read "Sections 93-202, 93-203, 93-204, 93-205, 93-206, R. C. M. 1947, are repealed."

**93-202 to 93-206. (8791 to 8795) Repealed.**

**Repeal**

Sections 93-202 to 93-206 (Secs. 2 to 6, Ch. 31, Ex. L. 1931), relating to appointments of additional justices to increase

the supreme court from three to five justices, were repealed by Sec. 2, Ch. 13, Laws 1973.

**93-209. (8798) Repealed.**

**Repeal**

Section 93-209 (Sec. 14, C. Civ. Proc. 1895), relating to filling of vacancies in

office of supreme court justice, was repealed by Sec. 14, Ch. 470, Laws 1973. For new law, see secs. 93-705 to 93-717.

**93-212. (8801) Decisions to be in writing.** In the determination of causes, all decisions of the supreme court must be given in writing, and the grounds of the decision must be stated, and each justice agreeing or concurring with the decision must so indicate by signing the decision. Any justice disagreeing with a decision must so indicate by written dissent.

**History:** Ap. p. Sec. 440, p. 132, Ban-nack Stat.; re-en. Sec. 597, p. 157, Cod. Stat. 1871; re-en. Sec. 17, C. Civ. Proc. 1895; re-en. Sec. 6249, Rev. C. 1907; re-en. Sec. 8801, R. C. M. 1921; amd. Sec. 1, Ch. 271, L. 1975. Cal. C. Civ. Proc. Sec. 49.

**Amendments**

The 1975 amendment added "and each justice agreeing or concurring with the decision must so indicate by signing the decision" to the first sentence; and added the second sentence.

**93-214. (8803) Original jurisdiction.**

**Declaratory Judgment**

Determination of legal rights concerning election of delegates and implementation of state constitutional convention was properly decided in declaratory judg-

ment action by supreme court under its original jurisdiction in aid of its appellate jurisdiction. Forty-Second Legislative Assembly v. Lennon, 156 M 416, 481 P 2d 330.

**93-216. (8805) Powers and duties of supreme court on appeals.**

**Equity Case**

In an equity case it is proper for the appellate court to pry into the factual issues of the case and the decision must

hinge on factual observations unless the case is returned to the lower court for further proceedings. Jensen v. Olson, 144 M 224, 395 P 2d 465, 468.

The supreme court in reviewing an equity case will review the law therein and also will review the evidence to that extent necessary to ascertain whether the findings of fact by the trial court are substantially supported and sufficient to support the conclusions of law derived therefrom. *Bender v. Bender*, 144 M 470, 397 P 2d 957.

Supreme court in equity case not only has function of reviewing law involved but also reviews evidence to extent of determining whether findings of fact by trial court are supported by substantial evidence. *White v. Nollmeyer*, 151 M 387, 443 P 2d 873.

The plaintiff's claim of a resulting trust in real property, raised after a period of 24 years, and after the principal parties are dead, warrants the application of the doctrine of laches. *Adair v. Capital Invest Co.*, — M —, 525 P 2d 548.

#### Nuisance Cases

Supreme court will not hesitate to set aside lower court finding that nuisance exists where there is no substantial evidence on which to base finding. *Kasala v. Kalispell Pee Wee Baseball League*, 151 M 109, 439 P 2d 65, 32 ALR 3d 1120.

#### Probate Proceedings

Supreme court reversed where evidence did not support district court finding that will was drafted at direction of decedent and that he was aware of its contents when he signed. *Erickson v. Erickson*, 152 M 179, 448 P 2d 144.

#### Remand to District Court

Trial court abused discretion in dismissing action for failure of plaintiff to prosecute case returned by supreme court

to lower court for new trial where trial court failed to set trial for next jury term as per order of supreme court under statute providing that supreme court may direct new trial. *Jangula v. United States Rubber Co.*, 149 M 241, 425 P 2d 319.

Where testimony given at trial did not conform to trial court's findings of fact concerning property valuation in divorce case, case was remanded to trial court for hearing to establish proper division of property and/or alimony for support of defendant. *Whitman v. Whitman*, — M —, 519 P 2d 966.

#### Scope of Review

Function of supreme court on review is to determine whether there is substantial evidence to support findings of fact and conclusions of law. *Peery v. Higgins*, 152 M 140, 447 P 2d 481.

Review of evidence is limited to determining whether there is substantial evidence to support trial court's findings of fact and whether such findings are sufficient to support conclusions of law. *Keller v. Martin*, 153 M 9, 452 P 2d 422.

#### Specific Performance

Where district court decree ordering conveyance of property contained directions as to distribution of the sale price that could be construed as at variance from its findings as to ownership, supreme court could modify decree so as to distribute money in accordance with the findings. *Morris v. Monk*, 158 M 163, 489 P 2d 1029.

#### References

*Kyser v. Hiebert*, 142 M 466, 385 P 2d 90; *State ex rel. Keast v. Krieg*, 147 M 164, 410 P 2d 710.

### 93-219. Justice or judge not to run for office—resignation required.

(1) (a) If a person occupying the office of chief justice or associate justice of the supreme court or judge of a district court of the state of Montana becomes a candidate for election to any elective office under the laws of the state of Montana, he shall immediately, and in any event at or before the time when he must file as a candidate for such office in any primary or special or general election, resign from his office of chief justice, associate justice, or district judge.

(b) The resignation becomes effective immediately upon its delivery to the proper officer or superior.

(c) The resignation requirement applies except when the person is a bona fide candidate for reelection to the identical office then occupied by him or for another nonpartisan judicial office the term of which does not commence earlier than the end of the term of the office then occupied by him.

(2) In the event of a failure to resign, the office of chief justice, associate justice, or district judge automatically becomes vacant and the



former occupant has no further right, power, or authority therein for any purpose and no right to any emoluments thereof, notwithstanding the fact that a successor is not appointed or elected. The vacancy becomes operative to deprive the person of the emoluments of the office in order to carry out the policy of this act.

**History:** En. Sec. 1, Ch. 139, L. 1957; amd. Sec. 21, Ch. 344, L. 1977.

#### Amendments

The 1977 amendment divided the section

into subsections; inserted the references to the judge of the district court in subdivision (1)(a); and made minor changes in phraseology, punctuation and style. For prior version, see parent volume.

### 93-220. Repealed.

#### Repeal

Section 93-220 (Sec. 2, Ch. 139, L. 1957), relating to filling vacancy on su-

preme court, was repealed by Sec. 14, Ch. 470, Laws 1973. For new law, see secs. 93-705 to 93-717.

### 93-221 to 93-233. Repealed.

#### Repeal

Sections 93-221 to 93-233 (Secs. 1 to 13, Ch. 255, L. 1959; Sec. 60, Ch. 439, L.

1975), relating to civil rules of procedure commission, were repealed by Sec. 60, Ch. 344, Laws 1977.

**93-232. Expenses of members of commission.** Members of said commission shall serve without compensation, but shall be reimbursed for travel expenses, as provided for in sections 59-538, 59-539, and 59-801, incurred in the discharge of their duties, including attendance at meetings.

**History:** En. Sec. 12, Ch. 255, L. 1959; amd. Sec. 60, Ch. 439, L. 1975.

expenses, as provided for in sections 59-538, 59-539, and 59-801" for "actual travel and other expenses."

#### Amendments

The 1975 amendment substituted "travel

## CHAPTER 3—DISTRICT COURTS

- Section 93-301. Judicial districts defined.  
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- 93-362. Entry of judgment.
- 93-363. Execution.
- 93-364. Fees—costs.

**93-301. (8812) Judicial districts defined.** In this state there are 19 judicial districts, distributed as follows:

First district: Lewis and Clark and Broadwater counties.

Second district: Silver Bow County.

Third district: Deer Lodge, Granite, and Powell counties.

Fourth district: Missoula, Mineral, Lake, Ravalli, and Sanders counties.

Fifth district: Beaverhead, Jefferson, and Madison counties.

Sixth district: Park and Sweet Grass counties.

Seventh district: Dawson, McCone, Richland, and Wibaux counties.

Eighth district: Cascade and Chouteau counties.

Ninth district: Teton, Pondera, Toole, and Glacier counties.

Tenth district: Fergus, Judith Basin, and Petroleum counties.

Eleventh district: Flathead County.

Twelfth district: Liberty, Hill, and Blaine counties.

Thirteenth district: Yellowstone, Big Horn, Carbon, Stillwater, and Treasure counties.

Fourteenth district: Meagher, Wheatland, Golden Valley, and Musselshell counties.

Fifteenth district: Roosevelt, Daniels, and Sheridan counties.

Sixteenth district: Custer, Carter, Fallon, Prairie, Powder River, Garfield, and Rosebud counties.

Seventeenth district: Phillips and Valley counties.

Eighteenth district: Gallatin County.

Nineteenth district: Lincoln County.

**History:** En. Sec. 6256, Rev. C. 1907; re-en. Sec. 8812, R. C. M. 1921; amd. Sec. 1, Ch. 91, L. 1929; amd. Sec. 1, Ch. 23, L. 1973; amd. Sec. 1, Ch. 517, L. 1977.

The 1977 amendment increased the number of judicial districts from 18 to 19 by removing Lincoln County from the eleventh district and making it the nineteenth district.

#### **Amendments**

The 1973 amendment increased the number of districts from seventeen to eighteen and transferred Gallatin county from the sixth to the eighteenth district.

#### **Repealing Clause**

Section 2 of Ch. 23, Laws 1973 read "Sections 93-301.1, 93-301.2, 93-301.3, and 93-301.4, R. C. M. 1947, are repealed."

**93-301.1 to 93-301.4. Repealed.****Repeal**

Sections 93-301.1 to 93-301.4 (Secs. 1 to 4, Ch. 80, L. 1947), creating the

eighteenth judicial district, were repealed by Sec. 2, Ch. 23, Laws 1973. For present law, see sec. 93-301.

**93-302. Number of judges.** In each judicial district there must be the following number of judges of the district court, who must be elected by the qualified voters of the district and whose term of office is 6 years:

- (1) in the 1st, 2nd, 11th, 16th, and 18th districts, two judges each;
- (2) in the 4th and 8th districts, three judges each; and
- (3) in the 13th district, four judges;
- (4) in all other districts, one judge each.

**History:** En. Sec. 1, p. 156, L. 1901; re-en. Sec. 6264, Rev. C. 1907; re-en. Sec. 8813, R. C. M. 1921; amd. Sec. 2, Ch. 91, L. 1929; amd. Sec. 1, Ch. 18, L. 1955; amd. Sec. 1, Ch. 91, L. 1957; amd. Sec. 1, Ch. 161, L. 1959; amd. Sec. 1, Ch. 229, L. 1963; amd. Sec. 1, Ch. 14, L. 1973; amd. Sec. 22, Ch. 344, L. 1977; amd. Sec. 2, Ch. 517, L. 1977.

**Compiler's Notes**

This section was amended twice in 1977, once by Ch. 344 and once by Ch. 517. Since the amendments do not appear to conflict, the code commissioner has made a composite section embodying the changes made by both amendments.

**Amendments**

The 1973 amendment increased the term of office from four to six years; and deleted a second paragraph relating to the

appointment of a judge of the fourth district to serve until the 1964 election.

Chapter 344, Laws of 1977, numbered the subdivisions; and made minor changes in phraseology, punctuation and style.

Chapter 517, Laws of 1977, increased the number of judges in the 18th district from one to two and in the 13th district from three to four; and made minor changes in phraseology, punctuation and style.

**Selection of New Judges**

Section 3 of Ch. 517, Laws of 1977 read: "New judges—how selected. The judgeships created by this act in previously existing districts shall be filled initially at the 1978 general election and shall take office on January 1, 1979. The judge in the 19th judicial district shall be appointed by the governor under the provisions of 93-705 through 93-717."

**93-303. (8814) Salaries of district judges.** The annual salary of each district judge is \$35,000.

**History:** En. Sec. 1, Ch. 176, L. 1919; re-en. Sec. 8814, R. C. M. 1921; amd. Sec. 1, Ch. 114, L. 1947; amd. Sec. 1, Ch. 84, L. 1951; amd. Sec. 1, Ch. 247, L. 1955; amd. Sec. 1, Ch. 198, L. 1959; amd. Sec. 1, Ch. 187, L. 1961; amd. Sec. 2, Ch. 212, L. 1963; amd. Sec. 2, Ch. 308, L. 1967; amd. Sec. 1, Ch. 322, L. 1969; amd. Sec. 1, Ch. 4, 2nd Ex. L. 1971; amd. Sec. 2, Ch. 377, L. 1974; amd. Sec. 3, Ch. 461, L. 1977.

**Amendments**

The 1967 amendment increased from \$14,000 to \$15,000 the annual salary for district judges.

The 1969 amendment increased the annual salary from \$15,000 to \$19,000.

The 1971 amendment increased the annual salary from \$19,000 to \$20,500, effective July 1, 1971.

The 1974 amendment increased the annual salary from \$20,500 to \$25,000, effective July 1, 1974.

The 1977 amendment increased the salaries of district judges from \$25,000 to \$35,000.

**Repealing Clause**

Section 3 of Ch. 308, Laws 1967 repealed all acts and parts of acts in conflict therewith.

**Effective Date**

Section 3 of Ch. 377, Laws 1974 read "This act is effective July 1, 1974."

**93-305. (8816) Expenses when out of district.** A judge who sits in the place of another judge in the trial or hearing of an action or proceeding in a district other than his own or in the supreme court or who attends a conference of judges in Helena called by the chief justice of the supreme

court shall be paid his actual and necessary travel expenses while engaged in that service as follows:

(1) his travel expenses in going from the county seat which he makes his place of residence to the place of trial or conference and return; and

(2) his board and lodging while engaged in the trial, hearing, or conference.

**History:** En. Sec. 1, Ch. 3, L. 1907; Sec. 293, Rev. C. 1907; re-en. Sec. 8816, R. C. M. 1921; amd. Sec. 1, Ch. 15, L. 1953; amd. Sec. 61, Ch. 439, L. 1975; amd. Sec. 23, Ch. 344, L. 1977.

#### Amendments

The 1975 amendment substituted "travel expenses" for "actual expenses" and "ac-

tual traveling expenses" in the first sentence; and added the second sentence.

The 1977 amendment inserted "actual and necessary" before "travel expenses"; deleted a second sentence reading "All travel expense reimbursements shall be determined as provided for in sections 59-538, 59-539, and 59-801"; and made minor changes in phraseology, punctuation and style.

### 93-309. (8820) Repealed.

#### Repeal

Section 93-309 (Sec. 35, C. Civ. Proc. 1895), relating to vacancies on the district

court bench, was repealed by Sec. 14, Ch. 470, Laws 1973. For new law, see secs. 93-705 to 93-717.

**93-313. (8824) Expenses when not in county of residence.** A district judge of a judicial district composed of more than one county who, for the purpose of holding court and disposing of judicial business, goes to a county of his judicial district other than the county in which he resides and therein holds court or transacts judicial business shall be paid all of his actual and necessary expenses of transportation and living incurred on account thereof from the time he leaves his place of residence until he returns thereto.

**History:** En. Sec. 1, Ch. 91, L. 1911; re-en. Sec. 8824, R. C. M. 1921; amd. Sec. 2, Ch. 455, L. 1973; amd. Sec. 62, Ch. 439, L. 1975; amd. Sec. 24, Ch. 344, L. 1977.

#### Amendments

The 1973 amendment added the second sentence.

The 1975 amendment inserted "as provided for in sections 59-538, 59-539, and 59-801" near the end of the section; and

deleted a final sentence which read "Actual and necessary expenses of transportation incurred when a judge uses his own automobile shall be calculated at the rate of twelve cents (\$.12) per mile."

The 1977 amendment deleted "and all expenditures made therefor, as provided for in sections 59-538, 59-539, and 59-801" after "on account thereof"; and made minor changes in phraseology and punctuation.

**93-318. (8829) Original jurisdiction.** (1) The district court has original jurisdiction in:

- (a) all criminal cases amounting to felony,
- (b) all civil and probate matters,
- (c) all cases at law and in equity,
- (d) all cases of misdemeanor not otherwise provided for, and
- (e) all such special actions and proceedings as are not otherwise provided for.

(2) The district court has the power of naturalization, and to issue papers therefor, in all cases where they are authorized to do so by the laws of the United States.



(3) The district court and its judges have power to issue, hear, and determine writs of mandamus, quo warranto, certiorari, prohibition, injunction, and other original remedial writs, and all writs of habeas corpus, on petition by, or on behalf of any person held in actual custody in their respective districts. Injunctions, writs of prohibition, and habeas corpus may be issued and served on legal holidays and nonjudicial days.

**History:** En. Sec. 41, C. Civ. Proc. 1895; re-en. Sec. 6275, Rev. C. 1907; re-en. Sec. 8829, R. C. M. 1921; amd. Sec. 1, Ch. 11, L. 1973. Cal. C. Civ. Proc. Sec. 76.

#### **Certiorari**

Certiorari is never properly granted where the matters over which review is sought are pending or undetermined; thus, district court could not properly issue writ of certiorari to determine, in a case pending before the police commission, whether the commission could compel a witness' testimony. *Matter of Dewar*, — M —, 548 P 2d 149.

#### **Amendments**

The 1973 amendment divided the section into numbered subdivisions; rewrote subdivision (1) to conform to the new constitution; and made minor changes in style.

### **93-320. (8831) Process.**

#### **References**

*Beavers v. Rankin*, 142 M 570, 385 P 2d 640.

**93-322. Small claims court authorized.** There may be created within the jurisdiction of the district court of any county of the state of Montana a separate court, known as the "Small Claims Court."

**History:** En. 93-322 by Sec. 1, Ch. 519, L. 1975.

#### **Title of Act**

An act providing for small claims courts in the state of Montana.

**93-323. Creation of small claims court.** A small claims court may be created by a resolution passed by the board of county commissioners after consultation with the district court judges of the judicial district in which such county is located, or by county initiative as provided in Title 37, chapter 3, R. C. M. 1947. Upon such order or passage of the resolution or initiative, the judge of the appropriate judicial district shall, by court order, establish a small claims court under the provisions of this act. When the order is filed with the clerk of the district court of the appropriate county the clerk of the district court becomes the clerk of the small claims court.

**History:** En. 93-323 by Sec. 2, Ch. 519, L. 1975.

**93-324. Duration of small claims court.** A small claims court created under this act continues in existence until abolished by the same means by which it was formed under section 93-323. Any small claims court may be abolished by county initiative as provided in section 93-323.

**History:** En. 93-324 by Sec. 3, Ch. 519, L. 1975.

**93-325. Appointment—salary—qualifications.** (1) The judges of the judicial district in which a small claims court has been created shall appoint a judge of the small claims court who shall:

(a) take the oath required of judges;

- (b) serve at the pleasure of the district court judges;
- (c) be paid a salary set by the district court judges; and
- (d) be an attorney licensed to practice law in Montana.

(2) The judges of the district court may appoint more than one small claims court judge for any small claims court. The salary shall be prorated among the judges appointed.

**History:** En. 93-325 by Sec. 4, Ch. 519, L. 1975; amd. Sec. 25, Ch. 344, L. 1977.

**Amendments**

The 1977 amendment substituted

“judges” for “judge” in subdivision (1)(c) and near the beginning of subsection (2); and made minor changes in phraseology, punctuation and style.

**93-326. Location—office hours—duties of judge.** The small claims court shall be located in the appropriate district and shall be open as required by the district judge. In the event that more than one (1) small claims court judge has been appointed, the judges so appointed may divide their responsibility hereunder. The small claims court judge shall assist any claimant in preparing an affidavit or may direct the clerk of court to provide such assistance.

**History:** En. 93-326 by Sec. 5, Ch. 519, L. 1975.

**93-327. Multi-county small claims courts.** Where there is more than one county in the judicial district and the county commissioners of more than one county in that district create small claims courts, the district judges may provide that the same judge of small claims court may preside over more than one of the small claims courts in the judicial district. In such cases the salary of the small claims court judge shall be prorated among the counties in which he presides. The judge shall be entitled to collect mileage for the distance actually traveled when required to convene small claims court in more than one county, pursuant to section 59-801.

**History:** En. 93-327 by Sec. 6, Ch. 519, L. 1975.

**93-328. Act to be liberally construed.** It is the purpose of this act to provide a speedy remedy in claims falling hereunder, and to promote a forum in which such claims may be heard and disposed of without the necessity of formal trial. For this reason, the provisions hereof should be liberally construed to provide an informal, but equitable, means of justice, and the judges appointed hereunder are required to assist all parties before them to obtain substantial justice.

**History:** En. 93-328 by Sec. 7, Ch. 519, L. 1975.

**93-329. Jurisdiction.** (1) The small claims court has original jurisdiction in all actions for the recovery of money or specific personal property when such action arises out of a contract, express or implied, and the amount of the claim, exclusive of costs, does not exceed one thousand five hundred dollars (\$1,500) and the defendant can be served within the

county or counties for which the small claims court has been created. More than one (1) claim may be joined, if all claims joined would separately meet the requirements for jurisdiction in the small claims court and the total value of money claimed or property sought does not exceed one thousand five hundred dollars (\$1,500).

(2) A district court judge may require any action filed in district court to be removed to the small claims court, if the amount in controversy does not exceed one thousand five hundred dollars (\$1,500). The small claims court shall hear any action so removed from the district court.

History: En. 93-329 by Sec. 8, Ch. 519,  
L. 1975.

**93-330. Parties—representation.** (1) Parties in the small claims court may be individuals, partnerships, corporations, unions, associations, or any other kind of organization or entity.

(2) A party may not be represented by an attorney unless all parties are represented by an attorney in a small claims court except as set forth in subsection (3) herein.

(3) An individual shall represent himself in the small claims court. A partnership shall be represented by a partner or one of its employees. A union shall be represented by a union member or union employee. A corporation shall be represented by one of its employees. An association shall be represented by one of its members or by an employee of the association. Any other kind of organization or entity shall be represented by one of its members or employees.

(4) Only a party, natural or otherwise, who has been a party to the transaction with the defendant for which the claim is brought may file and prosecute a claim in the small claims court.

(5) No party may file an assigned claim in the small claims court.

(6) Notwithstanding any other provision of this section, an executor or administrator of a decedent's estate, a guardian, or a conservator may be a party in the small claims court.

History: En. 93-330 by Sec. 9, Ch. 519,  
L. 1975.

**93-331. Venue.** Proper venue for actions commenced in small claims court is the same as that provided by law for civil actions commenced in district court.

History: En. 93-331 by Sec. 10, Ch. 519,  
L. 1975.

**93-332. Commencement of actions.** Actions in small claims court shall be commenced by filing an affidavit with the clerk of court. The clerk of court shall provide forms for the affidavits, which shall be in substantially the following form:

"In the Small Claims Court of the \_\_\_\_\_ Judicial District in and for the County of \_\_\_\_\_, State of Montana.



\_\_\_\_\_,  
Plaintiff  
vs.  
\_\_\_\_\_,  
Defendant

Doc. \_\_\_\_\_ No. \_\_\_\_\_  
PLAINTIFF'S COMPLAINT/  
AFFIDAVIT NOTICE TO  
DEFENDANT, SEEKING  
MONEY DAMAGES

Plaintiff states that defendant(s) owe and should be ordered to pay to me the sum of -----, because on ----- at -----, the defendant(s)  
(date) (place)

Plaintiff declares that the defendant or defendants are not a "person in military service" or "person in the military service of the United States" as defined in Sec. 101 of the Soldier's and Sailor's Relief Act, 1940. To the best of my knowledge and belief, the defendant named above resides at the following address, or the following is the business address:

My printed name and printed address are as follows:

Signed in my presence

Signature: \_\_\_\_\_

Clerk or Deputy

Today's date: \_\_\_\_\_

## ORDER OF THE COURT/NOTICE TO DEFENDANT

This claim has been filed against you. You must appear before this court on \_\_\_\_\_ at \_\_\_\_\_ at \_\_\_\_\_. If you do not appear, a  
(date) (time) (location)

judgment may be entered against you. Costs of the action also may be charged against you. You should read the information on the back of this claim and notice. If you have any questions about the procedure, you may contact the Clerk of the Court in person at \_\_\_\_\_  
(location of court)

or by telephone at \_\_\_\_\_.  
(number)

Clerk of the Court  
By: \_\_\_\_\_

History: En. 93-332 by Sec. 11, Ch. 519,  
L. 1975.

**93-333. Order of court—contents.** (1) Upon filing the affidavit and payment of the fee hereinafter provided, the clerk of court shall cause to be delivered to the sheriff of the county of the defendant's residence a copy of the affidavit together with the original and a copy of an order issued by the court, directed to the defendant, and directing the defendant to pay the claim set forth in the affidavit, or deliver up the property described, or, in the alternative, to appear and answer the claim set forth in the affidavit.

(2) The order shall:

(a) specify the time, date, and place set for hearing the claim;

(b) state that if the defendant fails to appear at the hearing and has not satisfied the claim, judgment will be entered against him in the amount or for the relief claimed, for costs; and

(c) be signed by the clerk of court and bear the seal of the court.

History: En. 93-333 by Sec. 12, Ch. 519,  
L. 1975.

**93-334. Service on defendant.** The original order shall be shown to the defendant and a copy of it along with a copy of the affidavit shall be served upon the defendant by the sheriff in the same manner provided by law for service of process in civil actions in district court. The provisions of law relating to sheriff's fees are applicable to this section.

History: En. 93-334 by Sec. 13, Ch. 519,  
L. 1975.

**93-335. Hearing date—how set.** The date for the appearance of the defendant to be set forth in the order shall be determined by the clerk of court in accordance with rules adopted by the small claims judge, and shall not be more than thirty (30) nor less than ten (10) days from the date of the order. Service of the order and copy of the affidavit shall be made upon the defendant not less than seven (7) days prior to the date set for his appearance by the order. If the order is not timely served, plaintiff may have a new appearance date set by the clerk and a new order issued and delivered to the sheriff, and, if necessary, repeated orders may be issued at any time within one year after the commencement of the action.

History: En. 93-335 by Sec. 14, Ch. 519,  
L. 1975.

**93-336. Return of service.** The sheriff, after effecting service, shall make return upon the original order and file it with the clerk of court.

History: En. 93-336 by Sec. 15, Ch. 519,  
L. 1975.

**93-337. Defendant's counterclaim — answer.** (1) If the defendant wishes to assert a counterclaim against the plaintiff he shall file a written answer setting forth his counterclaim against the plaintiff and shall cause the answer to be served upon the plaintiff not less than seventy-two (72) hours before the date set for the hearing. Service shall be made in the same manner in which service is made upon the defendant.

(2) A counterclaim or setoff may not exceed one thousand five hundred dollars (\$1,500). If a counterclaim or setoff is asserted in excess of one thousand five hundred dollars (\$1,500), the jurisdiction of the small claims court over the plaintiff's claim is not defeated, but the court shall limit its determination of the counterclaim or setoff only to the question of whether plaintiff's claim is discharged thereby, leaving defendant to prosecute the balance of his claim in appropriate district court action.

History: En. 93-337 by Sec. 16, Ch. 519,  
L. 1975.

**93-338. Attachment—execution.** Attachment or prejudgment garnishment is not available in actions brought in small claims court. Proceedings to enforce or collect a judgment are governed by the laws relating to executions upon district court judgments.

History: En. 93-338 by Sec. 17, Ch. 519,  
L. 1975.

**93-339. Proceedings informal—court reporters.** If the action is tried to the court, the proceedings shall be informal to the extent possible in order to dispense speedy justice to the parties. A reporter is not necessary unless the judge finds the issues sufficiently complex that a record is desirable, in which case he shall make arrangements with a court reporter of the district court to take the testimony. The judge shall make findings of fact sufficient to establish in full the basis of his judgment, and shall file them with his judgment. If a jury is empaneled, it shall try all issues of fact, and in such case there shall be a court reporter.

History: En. 93-339 by Sec. 18, Ch. 519,  
L. 1975.

**93-340. Small claims jury—waiver—request.** The plaintiff, by filing the affidavit for a proceeding in small claims court waives the right to jury trial. Defendant may request a jury provided such request is made not less than forty-eight (48) hours prior to the date set for hearing. If defendant pleads a counterclaim or setoff, he, too, waives a jury trial. If a jury is requested, it shall be empaneled in the same fashion as provided for district court juries in civil cases involving less than ten thousand dollars (\$10,000).

History: En. 93-340 by Sec. 19, Ch. 519,  
L. 1975.

**93-341. Evidence—subpoena power.** Both parties have the right to offer evidence, written and oral, and the judge may direct the production of evidence as he deems appropriate. The small claims court has the subpoena power granted to district courts in civil cases.

History: En. 93-341 by Sec. 20, Ch. 519,  
L. 1975.

**93-342. Entry of judgment.** Upon the conclusion of a case tried to the court the judge shall make his findings and enter judgment. Judgment shall be entered upon a jury verdict in the same manner as is provided for district court jury trials.

History: En. 93-342 by Sec. 21, Ch. 519,  
L. 1975.

**93-343. Appeals.** If either party is dissatisfied with the judgment of the small claims court he may appeal to the district court of the county where the judgment was rendered, in the same fashion as appeals in other civil actions. Any such appeal shall be tried de novo.



In the event that the parties are represented by counsel on appeal, the judge may grant the prevailing party, in addition to costs, reasonable attorney fees.

History: En. 93-343 by Sec. 22, Ch. 519, L. 1975.

**93-344. Fees—cost.** (1) The clerk of court shall collect a fee of five dollars (\$5):

- (a) from the plaintiff upon the filing of the affidavit;
- (b) from the defendant upon the filing of a written answer.

(2) The laws relating to paupers' affidavits apply to actions before the small claims courts.

(3) The prevailing party in an action before the small claims court is entitled to costs.

History: En. 93-344 by Sec. 23, Ch. 519, L. 1975.

**Separability Clause**

Section 24 of Ch. 519, Laws 1975 read "It is the intent of the legislature that if a part of this act is invalid, all valid parts

that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications."

**93-345. Purpose.** It is the purpose of this act to provide a speedy remedy for small claims and to promote a forum in which such claims may be heard and disposed of without the necessity of a formal trial.

History: En. 93-345 by Sec. 1, ch. 572, L. 1977.

**Title of Act**

An act to establish small claims procedures for justices' courts in the state of Montana.

**93-346. Creation of small claims court.** There is established within the jurisdiction of each justice's court in this state a small claims division to be known as the "small claims court".

History: En. 93-346 by Sec. 2, Ch. 572, L. 1977.

**93-347. Jurisdiction.** (1) The small claims court has jurisdiction over all actions for the recovery of money or specific personal property when the amount claimed does not exceed \$750, exclusive of costs, and the defendant can be served within the county where the action is commenced.

(2) A district court judge may require any action filed in district court to be removed to the small claims court if the amount in controversy does not exceed \$500. The small claims court shall hear any action so removed from the district court.

History: En. 93-347 by Sec. 3, Ch. 572, L. 1977.

**93-348. Venue.** Proper venue for actions commenced in the small claims court is the same as that provided by law for civil actions commenced in justice's court.

History: En. 93-348 by Sec. 4, Ch. 572, L. 1977.

**93-349. Commencement of actions—pleadings—informal proceedings.**  
A small claims action is commenced whenever any person appears before a justice of the peace and executes a sworn small claims complaint in substantially the same form as set forth in 93-350. No form of pleading other than the complaint and the order of the court/notice to defendant is allowed, and the hearing and disposition of small claims actions shall be informal.

**History:** En. 93-349 by Sec. 5, Ch. 572,  
L. 1977.

**93-350. Form of sworn complaint and order of the court/notice to defendant.** The sworn complaint and order of the court shall be made on a blank substantially in the following form:

IN THE SMALL CLAIMS DIVISION OF THE JUSTICE'S  
COURT OF \_\_\_\_\_ COUNTY, MONTANA  
BEFORE \_\_\_\_\_ JUSTICE OF THE PEACE

-----  
-----  
Plaintiff,  
vs. Complaint  
----- Case No.-----  
-----  
Defendant(s)

Comes now the plaintiff, being first duly sworn, upon oath, and complains and alleges that defendant is indebted to plaintiff in the sum of \$\_\_\_\_\_, for \_\_\_\_\_

which sum is now due, owing and unpaid despite demands for the payment thereof, together with plaintiff's costs herein expended.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

-----  
Plaintiff

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_  
19\_\_\_\_\_.

-----  
Plaintiff's address

-----  
Justice of the peace  
By:-----  
Clerk, small claims division

ORDER OF COURT/  
NOTICE TO DEFENDANT  
THE STATE OF MONTANA TO THE ABOVE-NAMED DEFENDANT(s):  
You are hereby directed to appear and answer the within and foregoing complaint at:

-----  
 -----  
 on ----- at -----  
 Reset for ----- at -----  
 Reset for ----- at -----  
 Reset for ----- at -----

and to have with you, then and there, all books, papers, and witnesses needed by you to establish your defense to the claim; and you are further notified that in case you do not appear, judgment will be taken against you by default, for the relief demanded in the complaint, and for costs of this action including costs of service of the complaint and order of the court/notice to defendant.

To the Sheriff, Constable, or Server of process of said county, greetings:

Make legal service and due return thereof on the defendant at -----

-----  
 Dated this ----- day of -----, 19-----.

-----  
 Justice of the peace  
 By:-----  
 Clerk of small claims division

**History:** En. 93-350 by Sec. 6, Ch. 572,  
 L. 1977.

**93-351. Service on defendant.** The original of the order and notice shall be shown to the defendant and a copy of it along with a copy of the sworn complaint shall be served upon the defendant by the sheriff, constable, or other process server in the same manner provided by law for service of process in civil actions in justice's court. The provisions of law relating to sheriff's fees are applicable to this section.

**History:** En. 93-351 by Sec. 7, Ch. 572,  
 L. 1977.

**93-352. Hearing date—how set.** The date for the appearance of the defendant to be set forth in the order shall be determined by the justice of the peace or by his clerk in accordance with rules adopted by the justice of the peace and may not be more than 20 or less than 10 days from the date of the order. Service of the order and a copy of the sworn complaint shall be made upon the defendant not less than 5 days prior to the date set for his appearance by the order. If the order is not timely served, the plaintiff may have a new appearance date set by the justice of the peace or his clerk and a new order issued and delivered to the sheriff, constable, or other process server. If necessary, repeated orders may be issued at any time within 1 year after the commencement of the action.

**History:** En. 93-352 by Sec. 8, Ch. 572,  
 L. 1977.

**93-353. Return of service.** The sheriff, constable, or other process server shall, after affecting service, return the original order to the justice of the peace or his clerk.



**History:** En. 93-353 by Sec. 9, Ch. 572,  
L. 1977.

**93-354. Parties—representation.** (1) Parties in the small claims court may be individuals, partnerships, corporations, unions, associations, or any other kind of organization or entity.

(2) A party may not be represented by an attorney unless all parties are represented by an attorney in a small claims court.

(3) An individual may represent himself in a small claims court. A partnership may be represented by a partner or one of its employees. A union may be represented by a union member or union employee. A corporation may be represented by one of its employees. An association may be represented by one of its members or by an employee of the association. Any other kind of organization or entity may be represented by one of its members or employees.

(4) Only a party, natural or otherwise, who has been a party to the transaction with the defendant for which the claim is brought may file and prosecute a claim in the small claims court.

(5) No party may file an assigned claim in the small claims court.

(6) No party may file more than three claims in any calendar year.

(7) Notwithstanding any other provision of this section, a personal representative of a decedent's estate, a guardian, or a conservator may be a party in the small claims court.

**History:** En. 93-354 by Sec. 10, Ch. 572,  
L. 1977.

**93-355. Witnesses—evidence—subpoena power.** The plaintiff and the defendant may offer evidence in their behalf by witnesses appearing at such hearing in the same manner as in other cases arising in justice's court or by written evidence and the judge may direct the production of evidence as he considers appropriate. The small claims court has the subpoena power granted to justices' courts in all civil cases.

**History:** En. 93-355 by Sec. 11, Ch. 572,  
L. 1977.

**93-356. Record.** All civil actions tried in a small claims court shall be recorded either electronically or stenographically.

**History:** En. 93-356 by Sec. 12, Ch. 572,  
L. 1977.

**93-357. Appeals—no trial de novo.** (1) If either party is dissatisfied with the judgment of the small claims court, he may appeal to the district court of the county where the judgment was rendered. An appeal shall be commenced by giving written notice to the small claims court and serving a copy of the notice of appeal on the adverse party within 10 days after entry of judgment. Within 30 days of the notice, the entire record of the small claims court proceedings shall be transmitted to the district court or the appeal shall be dismissed. It is the duty of the appealing party to perfect the appeal.

(2) There shall not be a trial de novo in the district court. The appeal shall be limited to questions of law.

**History:** En. 93-357 by Sec. 13, Ch. 572,  
L. 1977.

**93-358. Record on appeal.** When notice of appeal is filed, the justice shall forward the electronic recording or transcript of the stenographic record of the proceedings to the district court, together with the original papers filed certified by him to be accurate and complete. When the record is transferred to the clerk of the district court, the justice shall notify the parties in writing.

**History:** En. 93-358 by Sec. 14, Ch. 572,  
L. 1977.

**93-359. Use of transcripts or tapes by district court.** The district court may hear the recording of the proceedings of the justice court, but in its discretion, it may have parts or all of the recordings transcribed at the cost of the district court. If the proceedings are stenographically taken, the notes will be transcribed in full or in designated parts as stipulated by the parties. The cost of such transcription shall be computed as prescribed by law.

**History:** En. 93-359 by Sec. 15, Ch. 572,  
L. 1977.

**93-360. Location of court—office hours.** The small claims division of justice court shall be located at the same place as the justice's court and shall be open during the same hours as the justice's court.

**History:** En. 93-360 by Sec. 16, Ch. 572,  
L. 1977.

**93-361. Assistance by justice—record.** (1) The justice shall assist any claimant in preparing his complaint or instruct his clerk to provide such assistance.

(2) The justice shall enter in the docket kept by him for small claims cases the following:

- (a) the title of each action;
- (b) the amount claimed;
- (c) the date the order of court/notice to defendant was signed and the date of the trial as stated in the order;
- (d) the date the parties appeared or the date on which default was entered;
- (e) each adjournment stating on whose application and to what time;
- (f) the judgment of the court;
- (g) a statement of any money paid to the justice, when, and by whom;
- (h) the date of the issuance of any abstract of the judgment; and
- (i) the date of the receipt of the notice of appeal, if any is given, and of the appeal bond, if any is filed.

**History:** En. 93-361 by Sec. 17, Ch. 572,  
L. 1977.

**93-362. Entry of judgment.** Upon the conclusion of the case tried to the court, the justice shall make his findings and enter judgment.

**History:** En. 93-362 by Sec. 18, Ch. 572, L. 1977.

**93-363. Execution.** Proceedings to enforce or collect a judgment are governed by the laws relating to execution upon justice's court judgments.

**History:** En. 93-363 by Sec. 19, Ch. 572, L. 1977.

**93-364. Fees—costs.** (1) The clerk of the justice's court shall collect a fee of \$3.50:

- (a) from the plaintiff upon the filing of the sworn complaint; and
- (b) from the defendant upon his appearance and contesting of the complaint.

(2) The laws relating to paupers' affidavits apply to actions before the small claims court.

(3) The prevailing party in an action before the small claims court is entitled to his costs.

**History:** En. 93-364 by Sec. 20, Ch. 572, L. 1977.

#### **Separability Clause**

Section 21 of Ch. 572, Laws 1977 read:  
"If a part of this act is invalid, all valid

parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications."

### **CHAPTER 4—JUSTICES' AND CITY COURTS**

**Section 93-401. Justices' courts and justices of the peace.**

- 93-402. Courts—when open for business.
- 93-403. Holding court for another justice.
- 93-405. Terms of office.
- 93-408. Civil jurisdiction of justices' courts.
- 93-409. Concurrent jurisdiction.
- 93-410. Criminal jurisdiction.
- 93-411. City courts.
- 93-412. Facilities furnished to justices by county.
- 93-413. Salaries of justices of the peace.
- 93-414. Office hours of justices.

**93-401. (8833) Justices' courts and justices of the peace.** (1) There must be at least one (1) justice court in each county of the state. The board of county commissioners of each county of the state shall have authority to constitute one (1) additional justice court in their respective counties as the board deems necessary. One (1) justice court in each county must be located at the county seat and the board of county commissioners shall determine the location of the other justice court in their respective counties. Each justice of the peace must be elected by the qualified electors of the county at the general state election next preceding the expiration of the term of office of his predecessor.

(2) A justice of the peace shall be nominated and elected on the nonpartisan judicial ballot in the same manner as are judges of the district court. Each judicial office shall be a separate and independent



office for election purposes and each office shall be numbered by the county commissioners and each candidate for justice of the peace shall specify the number of the office for which he seeks to be elected. A candidate may not file for more than one (1) office. Section 23-4511 prohibiting political party endorsement for judicial officers shall also apply to justices of the peace.

(3) Each justice of the peace, elected or appointed, after he has received his certificate of election or appointment, shall, before entering upon the duties of his office take the constitutional oath of office, which must be filed with the county clerk.

(4) Before the county clerk may file the oath the elected or appointed justice must satisfy the clerk that he is either:

(a) an attorney at law authorized to practice law in the state of Montana, or

(b) a person who has held the office of justice of the peace within the preceding five (5) years, or

(c) a person who has completed the orientation course of study held under the direction of the university of Montana law school; or if a person is appointed after the course is offered he must agree to take the course at the next offering and failure to do so will disqualify him.

(5) The university of Montana law school shall present a course of study as soon as is practical following each general election. Mileage and per diem shall be paid the elected or appointed justice of the peace for attending the course and shall be a proper charge against the county wherein the justice of the peace will hold court.

(6) There shall be an annual training session for all elected and appointed justices of the peace. This training session, which may be held in conjunction with the Montana magistrates' association convention, shall be supervised by the supreme court. Mileage and per diem shall be paid the elected or appointed justice of the peace for attending the course and shall be a proper charge against the county wherein the justice holds court.

**History:** En. Sec. 60, C. Civ. Proc. 1895; re-en. Sec. 6279, Rev. C. 1907; re-en. Sec. 8833, R. C. M. 1921; amd. Sec. 4, Ch. 491, L. 1973; amd. Sec. 1, Ch. 23, L. 1974; amd. Sec. 1, Ch. 276, L. 1974; amd. Sec. 9, Ch. 420, L. 1975. Cal. C. Civ. Proc. Sec. 85.

#### Amendments

The 1973 amendment designated the language in the former section as subsection (1); reduced the number of justice courts from two per township to one per county; reduced the number of justices to be elected from two per township to one per county; and added subsections (2) through (5).

Chapter 23, Laws of 1974, substituted

"university of Montana law school" in subsection (4)(c) for "Montana Magistrates Association of the state of Montana"; substituted "university of Montana law school" in subsection (5) for "Montana Magistrates Association"; and substituted "as soon as is practical" near the beginning of subsection (5) for "within four (4) weeks."

Chapter 276, Laws of 1974, inserted the provisions in subsection (1) authorizing the board of county commissioners in every county to constitute one additional justice court and directing the location of the justice courts.

The 1975 amendment added subsection (6).

**93-402. (8834) Courts—when open for business.** A justice's court is always open for the transaction of business, except on legal holidays and nonjudicial days.

**History:** En. Sec. 61, C. Civ. Proc. 1895; re-en. Sec. 6280, Rev. C. 1907; re-en. Sec. 8834, R. C. M. 1921; amd. Sec. 1, Ch. 92, L. 1933; amd. Sec. 6, Ch. 491, L. 1973; amd. Sec. 3, Ch. 276, L. 1974. Cal. C. Civ. Proc. Sec. 104.

#### Amendments

The 1973 amendment substituted "county" for "township"; and deleted "provided, that said justice may hold court beyond the limits of his township as provided in section 93-403" from the end of the section.

The 1974 amendment deleted "where held" following "Courts" in the caption and deleted "may be held at any place selected by the justice holding the same, in the county for which he is elected or appointed; and such court" following "A justice's court."

#### Effective Date

Section 4 of Ch. 276, Laws 1974 provided the act should be in effect from and after its passage and approval. Approved March 25, 1974.

**93-403. (8835) Holding court for another justice.** A justice of the peace of any county may hold the court of any other justice of the peace at his request, and while so acting is vested with the power of the justice for whom he so holds court, in which case the proper entry of the proceedings before the attending justice, subscribed by him, must be made in the docket of the justice for whom he so holds the court. The visiting justice of the peace shall be paid all necessary and actual expenses including mileage by the county where court is held.

**History:** En. Sec. 62, C. Civ. Proc. 1895; re-en. Sec. 6281, Rev. C. 1907; re-en. Sec. 8835, R. C. M. 1921; amd. Sec. 2, Ch. 92, L. 1933; amd. Sec. 7, Ch. 491, L. 1973; amd. Sec. 10, Ch. 420, L. 1975. Cal. C. Civ. Proc. Sec. 105.

#### Amendments

The 1973 amendment substituted

"county" for "township"; and deleted from the end of the section a proviso and two sentences which allowed the justice to hold court beyond the limits of his township.

The 1975 amendment deleted "of the same county" after "any other justice of the peace" in the first sentence; and added the second sentence.

**93-405. (8837) Terms of office.** The term of office of justices of peace is four (4) years from the first Monday in January next succeeding their election.

**History:** En. Sec. 64, C. Civ. Proc. 1895; re-en. Sec. 6283, Rev. C. 1907; re-en. Sec. 8837, R. C. M. 1921; amd. Sec. 8, Ch. 491, L. 1973. Cal. C. Civ. Proc. Sec. 110.

#### Amendments

The 1973 amendment increased the term of office from two to four years.

### 93-407. (8839) Repealed.

#### Repeal

This section (Sec. 1, p. 99, L. 1901; Sec. 1, Ch. 35, L. 1921), relating to the oath and bond of the justice of the peace, was

repealed by Sec. 10, Ch. 68, Laws 1967. For new provisions relating to bonds of county officers and employees, see sec. 6-203 et seq.

**93-408. (8840) Civil jurisdiction of justices' courts.** The justices' courts have jurisdiction:

- (1) in actions arising on contract for the recovery of money only, if the sum claimed does not exceed \$1,500, exclusive of court costs;
- (2) in actions for damages not exceeding \$1,500, exclusive of court costs, for taking, detaining, or injuring personal property or for injury to real property when no issue is raised by the verified answer of the defendant involving the title to or possession of the real property;

(3) in actions for damages not exceeding \$1,500, exclusive of court costs, for injury to the person, except that, in actions for false imprisonment, libel, slander, criminal conversation, seduction, malicious prosecution, determination of paternity, and abduction, the justice of the peace does not have jurisdiction;

(4) in actions to recover the possession of personal property, if the value of the property does not exceed \$1,500;

(5) in actions for a fine, penalty, or forfeiture not exceeding \$1,500, imposed by a statute or an ordinance of an incorporated city or town, when no issue is raised by the answer involving the legality of any tax, impost, assessment, toll, or municipal fine;

(6) in actions upon bonds or undertakings conditioned for the payment of money, when the sum claimed does not exceed \$1,500, though the penalty may exceed that sum;

(7) to take and enter judgment for the recovery of money on the confession of a defendant, when the amount confessed does not exceed \$1,500, exclusive of court costs.

**History:** Ap. p. Sec. 546, p. 150, Bannack Stat.; amd. Sec. 655, p. 167, Cod. Stat. 1871; re-en. Sec. 715, 1st Div. Rev. Stat. 1879; amd. Sec. 1, p. 46, L. 1883; re-en. Sec. 735, 1st Div. Comp. Stat. 1887; amd. Sec. 66, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 76, L. 1907; Sec. 6286, Rev. C. 1907; re-en. Sec. 8840, R. C. M. 1921; amd. Sec. 11, Ch. 420, L. 1975; amd. Sec. 26, Ch. 344, L. 1977. Cal. C. Civ. Proc. Sec. 112.

#### Amendments

The 1975 amendment increased the monetary jurisdiction of justices of the peace from \$300 to \$1500 throughout the section.

The 1977 amendment substituted "determination of paternity" in subdivision (3) for "bastardy"; deleted "and alienation of affections" after "abduction" in subdivision (3); and made minor changes in phraseology, punctuation and style.

**93-409. (8841) Concurrent jurisdiction.** The justices' courts have concurrent jurisdiction with the district courts within their respective counties in actions of forcible entry and unlawful detainer.

**History:** En. Sec. 67, C. Civ. Proc. 1895; re-en. Sec. 6287, Rev. C. 1907; re-en. Sec. 8841, R. C. M. 1921; amd. Sec. 12, Ch. 420, L. 1975. Cal. C. Civ. Proc. Sec. 113.

#### Amendments

The 1975 amendment substituted "counties" for "townships."

**93-410. (8842) Criminal jurisdiction.** The justices' courts have jurisdiction of the following public offenses committed within the respective counties in which such courts are established:

1. Theft of property not exceeding one hundred fifty dollars (\$150) in value.

2. Assault, as defined in section 94-5-201.

3. \* \* \* [Same as parent volume.]

**History:** En. Sec. 68, C. Civ. Proc. 1895; re-en. Sec. 6288, Rev. C. 1907; re-en. Sec. 8842, R. C. M. 1921; amd. Sec. 13, Ch. 420, L. 1975. Cal. C. Civ. Proc. Sec. 115.

and substituted the present subdivision 2 for "Assault in the third degree, as defined in section 94-603."

#### Driving While under Influence of Intoxicating Liquor

**Amendments**  
The 1975 amendment substituted the present subdivision 1 for "Petit larceny";

Since the offense of driving a vehicle on a highway while under the influence of intoxicating liquor in violation of sec-



tion 32-2142 is a misdemeanor, it falls within the jurisdiction of a justice of the peace under this section. *Wilson v. Brodie*, 148 M 235, 419 P 2d 306, 308.

**93-411. (8843) City courts.** (1) City courts are established in incorporated cities and towns, and their organization, jurisdiction, and powers are provided for in Title 11. Police court is hereby renamed city court and all references to police court or police judges in sections of the Revised Codes of Montana shall be considered amended to read city court, or city judge.

(2) There shall be an annual training session for all elected and appointed judges. This training session, which may be held in conjunction with the Montana magistrates' association convention, shall be supervised by the supreme court. Mileage and per diem shall be paid the elected or appointed judge for attending the course and shall be a proper charge against the city wherein the judge holds court.

**History:** En. Sec. 80, C. Civ. Proc. 1895; re-en. Sec. 6289, Rev. C. 1907; re-en. Sec. 8843, R. C. M. 1921; amd. Sec. 3, Ch. 165, L. 1975. Cal. C. Civ. Proc. Sec. 121.

#### Amendments

The 1975 amendment inserted the subsection (1) designation; substituted "City courts" for "Police courts" at the beginning of subsection (1); added the second sentence of subsection (1); and added subsection (2).

**93-412. Facilities furnished to justices by county.** (1) The board of county commissioners of the county in which the justice of the peace has been elected or appointed shall provide for the justices of the peace:

(a) the office, courtroom and clerical assistance necessary to enable him to perform his duties in dignified surroundings;

(b) the books, records, forms, papers, stationery, postage, office equipment and supplies necessary in the proper keeping of the records and files of the judicial office and the transaction of the business;

(c) the latest edition of the Revised Codes of Montana and all official supplements thereto.

(2) All actual and necessary expenses incurred by the justice of the peace in the performance of his official duties is a legal charge against the county.

**History:** En. Sec. 3, Ch. 491, L. 1973.

#### Title of Act

An act providing for the minimum number of justices of the peace, their compensation, qualifications, terms of office, training and designation as county officers; providing for the collection of fees by justices and improvement of their facilities; abolishing fees in criminal actions; and deleting references to townships; all to comply with article VII, sections 5 and 7 of the 1972 Montana constitution; amending sections 11-727, 16-2403, 16-2404, 16-2406, 25-307, 93-401

through 93-403, 93-405, 93-704, 93-1602, 93-6601, 93-6602, 93-6706, 93-6903, 93-7302, 93-7311, 93-7402, 93-7605, 93-7607, 93-7704, 93-7709, 93-9705, R. C. M. 1947; and repealing sections 25-303, 25-305 and 25-306, R. C. M. 1947.

#### Actual and Necessary Expenses

Where justice of peace incurred unforeseen work load and hired part-time, temporary clerk, this constituted an actual and necessary expense and county commissioners had duty to pay it, even though it was not budgeted. *State ex rel. Browman v. Wood*, — M —, 543 P 2d 184.

**93-413. Salaries of justices of the peace.** The board of county commissioners shall set salaries for justices of the peace by resolution, provided that:

(1) if the salary of the justice of the peace was determined on a fee basis for the years 1971 and 1972, he shall receive a monthly salary of not less than one-eighteenth of the total fees, civil and criminal, collected by the justice or his predecessor in office during the two (2) years, 1971 and 1972;

(2) if the salary of the justice of the peace was determined on a nonfee basis for the years 1971 and 1972, the justice shall be paid not less than the highest salary earned by the justice or his predecessor for the years 1971 and 1972.

**History:** En. Sec. 1, Ch. 491, L. 1973.

#### **Interpretation of Salary**

In view of the salaries earned by other county officials and in view of the upgrading of the justices of the peace and the improvement of their courtrooms and

surroundings, the phrase "the years 1971 and 1972" must be interpreted as entitling nonfee justices to a salary equal to the combined salaries of their predecessor in 1971 and also 1972. Matter of Senate Bill No. 23, — M —, 540 P 2d 975.

**93-414. Office hours of justices.** In the resolution providing for the salary the county commissioners shall designate the office hours for each justice. Office hours shall be commensurate with the salary provided.

**History:** En. Sec. 2, Ch. 491, L. 1973.

### **CHAPTER 5—GENERAL PROVISIONS RESPECTING THE POWERS, PROCEEDINGS AND HOLDING OF COURTS OF JUSTICE**

Section 93-505. Sittings of court—when private.

93-507. Nonjudicial days.

93-514. Deaf persons—court appointed interpreters.

#### **93-502. (8845) Courts of record may make rules.**

##### **Force of Rules**

Trial court rule requiring filing of briefs in support of preliminary motions is proper exercise of authority under this

section and may be enforced by summary denial of motion where brief has not been filed. *Hansen v. Kiernan*, 159 M 448, 499 P 2d 787.

**93-505. (8848) Sittings of court—when private.** (1) In an action for dissolution of marriage, criminal conversation, or seduction, the court may direct the trial of any issue of fact joined therein to be private and exclude all persons except the officers of the court, the parties, their witnesses, and counsel.

(2) During the examination of a witness in any cause, the court may, in its discretion, exclude some or all of the other witnesses in the cause.

**History:** Ap. p. Sec. 451, p. 134, *Bannack Stat.*; re-en. Sec. 608, p. 159, *Cod. Stat.* 1871; re-en. Sec. 528, p. 178, L. 1877; re-en. Sec. 528, 1st Div. *Rev. Stat.* 1879; re-en. Sec. 545, 1st Div. *Comp. Stat.* 1887; amd. Sec. 101, *C. Civ. Proc.* 1895; re-en. Sec. 6291, *Rev. C.* 1907; re-en. Sec. 8848, *R. C. M.* 1921; amd. Sec. 23, Ch. 33, L. 1977; amd. Sec. 27, Ch. 344, L. 1977. *Cal. C. Civ. Proc. Sec.* 125.

1977, once by Ch. 33 and once by Ch. 344. Since the amendments do not appear to conflict, the code commissioner has made a composite section embodying the changes made by both amendments.

##### **Amendments**

Chapter 33, *Laws of 1977*, substituted "dissolution of marriage" for "divorce" near the beginning of the section; deleted "or breach of promise of marriage" after "seduction"; and made minor changes in phraseology and punctuation.

##### **Compiler's Notes.**

This section was amended twice in

Chapter 344, Laws of 1977, divided the section into subsections; deleted "or breach of promise of marriage" after "se-

duction" in subsection (1); and made minor changes in phraseology and punctuation.

**93-507. (8850) Nonjudicial days.** (1) No court may be open nor may any judicial business be transacted on legal holidays as provided for in 19-107 or on a day appointed by the president of the United States or by the governor of this state for a public fast, thanksgiving, or holiday, except for the following purposes:

(a) to give, upon its request, instructions to a jury when deliberating on its verdict;

(b) to receive a verdict or discharge a jury;

(c) for the exercise of the powers of a magistrate in a criminal action or in a proceeding of a criminal nature.

(2) Injunctions, writs of prohibition, and habeas corpus may be issued and served on any day.

**History:** Ap. p. Sec. 467, p. 136, *Bannack Stat.*; re-en. Sec. 589, p. 155, *Cod. Stat.* 1871; re-en. Sec. 514, p. 174, *L.* 1877; re-en. Sec. 514, 1st Div. *Rev. Stat.* 1879; re-en. Sec. 531, 1st Div. *Comp. Stat.* 1887; amd. Sec. 121, *C. Civ. Proc.* 1895; re-en. Sec. 6296, *Rev. C.* 1907; re-en. Sec. 8850, *R. C. M.* 1921; amd. Sec. 14, Ch. 420, *L.* 1975; amd. Sec. 28, Ch. 344, *L.* 1977. *Cal. C. Civ. Proc. Sec.* 134.

#### Amendments

The 1975 amendment substituted "on legal holidays as provided for in section 19-107 and" for the specific list of holidays in parent volume.

The 1977 amendment substituted "or on a day" for "and on a day" near the beginning of subsection (1); and made minor changes in phraseology, punctuation and style.

**93-514. Deaf persons—court appointed interpreters.** Whenever any deaf person is a party to any legal proceeding of any nature, or a witness therein, the court in all instances shall appoint a qualified interpreter of the deaf sign-language capable of communicating with the deaf person to interpret the proceedings to and the testimony of such deaf person. The court shall determine a reasonable fee for all such interpreter services which shall be paid out of general county funds.

**History:** En. 93-514 by Sec. 1, Ch. 272, *L.* 1975.

#### Title of Act

An act providing interpreters for deaf persons in legal proceedings.

## CHAPTER 7—QUALIFICATIONS, APPOINTMENT AND DISCIPLINE OF JUDICIAL OFFICERS

- Section 93-702. Qualifications and residence.  
 93-704. Residence and qualifications of justices of the peace.  
 93-705. Creation, composition, and function of commission.  
 93-706. Terms of commission members—vacancy.  
 93-707. Secretary of commission.  
 93-708. Quorum.  
 93-709. Investigation of candidates—application for candidacy.  
 93-710. Submission of list to governor to fill vacancy.  
 93-711. Appointment by governor from list submitted.  
 93-712. Governor's failure to nominate.  
 93-713. Confirmation by senate—interim appointment.  
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- 93-728. Order for retirement—removal.

### 93-701. (8862) Repealed.

**Repeal** of the supreme court, was repealed by Section 93-701 (Sec. 160, C. Civ. Proc. Sec. 2, Ch. 15, Laws 1973. For new law, 1895), relating to qualifications of justices see sec. 93-702.

**93-702. (8863) Qualifications and residence.** (1) No person is eligible for the office of justice of the supreme court or judge of a district court unless he is a citizen of the United States, has resided in the state 2 years immediately before taking office, and has been admitted to practice law in Montana for at least 5 years prior to the date of appointment or election.

(2) A judge of a district court need not be a resident of the district for which he is elected or appointed at the time of his election or appointment, but after his election or appointment, he must reside in a county seat in the district for which he is elected or appointed during his term of office. Justices of the supreme court must reside within the state during their terms of office.

**History:** En. Sec. 161, C. Civ. Proc. 1895; re-en. Sec. 6309, Rev. C. 1907; re-en. Sec. 8863, R. C. M. 1921; amd. Sec. 1, Ch. 15, L. 1973; amd. Sec. 29, Ch. 344, L. 1977. Cal. C. Civ. Proc. Sec. 157.

to practice for both supreme court justices and district court judges; applied the qualifications to appointments as well as elections; and added the last sentence.

The 1977 amendment inserted "in a county seat" in subsection (2); added "during their terms of office" to the end of subsection (2); and made minor changes in phraseology and style.

#### Amendments

The 1973 amendment combined sections 93-701 and 93-702; eliminated age requirements for justices of the supreme court and district judges; increased the state residency requirement for district judges from one year to two years; added the requirement of five years' admission

#### Repealing Clause

Section 2 of Ch. 15, Laws 1973 read "Section 93-701, R. C. M. 1947, is repealed."

### 93-703. (8864) Repealed.

**Repeal** judges, was repealed by Sec. 60, Ch. 344, Laws 1977. For present law, see 93-702.

**93-704. (8865) Residence and qualifications of justices of the peace.** Every justice of the peace must reside in the county in which his court is held, and no person is eligible to the office of justice of the peace unless he shall have been a citizen of the United States and a resident of the county, in which he is to serve, for one year next preceding his election or appointment.

History: En. Sec. 163, C. Civ. Proc. 1895; re-en. Sec. 6311, Rev. C. 1907; re-en. Sec. 8865, R. C. M. 1921; amd. Sec. 13, Ch. 491, L. 1973. Cal. C. Civ. Proc. Sec. 159.

#### Amendments

The 1973 amendment substituted "county" for "township" near the beginning of the section.

#### Constitutionality of Criminal Conviction Before Lay Judge

Defendant convicted before a lay judge was not deprived of any constitutional rights, even though the judge improperly denied his request for a jury trial and imposed a sentence not authorized by law, where all such errors could be cured in a trial de novo. *North v. Russell*, — US —, — L Ed 2d —, 96 S Ct 2709.

**93-705. Creation, composition, and function of commission.** A judicial nomination commission for the state of Montana is created. Its function is to provide the governor with a list of candidates for nomination to fill any vacancy on the supreme court or any district court of the state of Montana. The commission shall be composed of seven members as follows:

(1) four lay members who are neither judges nor attorneys, active or retired, who reside in different geographical areas of the state and each of whom is representative of a different industry, business, or profession, whether actively so engaged or retired, who shall be appointed by the governor;

(2) two attorneys actively engaged in the practice of law, one from each congressional district, who shall be appointed by the supreme court;

(3) one district judge elected by the district judges under an elective procedure initiated and conducted by the supreme court and certified to such election by the chief justice of the supreme court. The election shall be considered an appointment for the purposes of this act.

History: En. Sec. 1, Ch. 470, L. 1973; amd. Sec. 30, Ch. 344, L. 1977.

tana constitution; repealing sections 93-209, 93-220, 93-309, R. C. M. 1947.

#### Title of Act

An act providing for the filling of vacancies in the office of district court judge and supreme court justice to comply with article VII, section 8 of the 1972 Mon-

#### Amendments

The 1977 amendment made minor changes in phraseology, punctuation and style.

**93-706. Terms of commission members—vacancy.** (1) All original members named to the commission shall all serve until January 1, 1976. Their successors shall serve as follows:

(a) the members appointed by the governor shall serve for four (4) year terms;

(b) the attorneys elected shall serve a two (2) year term;

(c) the judge elected shall serve a two (2) year term.

(2) Thereafter all members shall serve terms of four (4) years.

(3) In the event a vacancy on the commission occurs, the governor shall appoint a replacement for the remainder of the term, provided such replacement shall be a member of the same group as the member he replaces.

(4) Appointments provided for in this section shall be made within thirty (30) days of the completion of the preceding terms, or within thirty (30) days of the occurrence of any vacancy.

History: En. Sec. 2, Ch. 470, L. 1973.

**93-707. Secretary of commission.** The commission shall elect one (1) of its members to serve as the secretary, and upon such election shall notify the governor of the name and mailing address of such person; the secretary shall keep a record of all proceedings by the commission, and act as corresponding secretary with the governor's office.

History: En. Sec. 3, Ch. 470, L. 1973.

**93-708. Quorum.** Four (4) members of the commission shall constitute a quorum for the transaction of business. To submit a name to the governor, there must be a concurrence of at least four (4) members.

History: En. Sec. 4, Ch. 470, L. 1973.

**93-709. Investigation of candidates—application for candidacy.** The commission and each member is authorized to make investigations concerning the qualifications of eligible persons, and any lawyer in good standing who has the qualifications set forth by law for holding judicial office, may be a candidate, and may make application to the commission for consideration, or application may be made by any person on his behalf.

History: En. Sec. 5, Ch. 470, L. 1973.

**93-710. Submission of list to governor to fill vacancy.** The commission shall meet forthwith after a vacancy occurs on the supreme court or district court and submit to the governor within thirty (30) days from the date of the vacancy a list of not less than three (3), nor more than five (5) persons.

History: En. Sec. 6, Ch. 470, L. 1973.

**93-711. Appointment by governor from list submitted.** The governor must make an appointment from those names submitted by the commission.

History: En. Sec. 7, Ch. 470, L. 1973.

**93-712. Governor's failure to nominate.** If the governor fails to nominate within thirty (30) days after receipt of the list, the chief justice or acting chief justice shall make the nomination.

History: En. Sec. 8, Ch. 470, L. 1973.

**93-713. Confirmation by senate—interim appointment.** Each nomination shall be confirmed by the senate, but a nomination made while the senate is not in session is effective as an appointment until the end of the next session. If the nomination is not confirmed, the office shall be vacant and another selection and nomination shall be made.

History: En. Sec. 9, Ch. 470, L. 1973.

**93-714. Term of appointment—election for unexpired term.** A nominee confirmed by the senate serves until the next succeeding general election. The candidate elected at that election holds the office for the remainder of the unexpired term.

History: En. Sec. 10, Ch. 470, L. 1973.



**93-715. Members of commission ineligible for judicial office.** Members of the commission are not eligible for nomination to a judicial office during their term on the commission or for one (1) year thereafter.

**History:** En. Sec. 11, Ch. 470, L. 1973.

**93-716. No compensation—travel expenses.** The members of the commission are not entitled to compensation for their services, but they are entitled to travel expenses, as provided for in 59-538, 59-539, and 59-801, as amended, while actually engaged in the discharge of their official duties.

**History:** En. Sec. 12, Ch. 470, L. 1973;  
amd. Sec. 29, Ch. 453, L. 1977.

**Amendments**

The 1977 amendment substituted "travel expenses, as provided for in 59-538, 59-539, and 59-801, as amended" for "actual expenses."

**93-717. Rules of commission.** The commission shall make rules for the conduct of its affairs and to provide for the confidentiality of its proceedings.

**History:** En. Sec. 13, Ch. 470, L. 1973.

**Repealing Clause**

Section 14 of Ch. 470, Laws 1973 read "Sections 93-209, 93-220, and 93-309, R. C. M. 1947, are repealed."

**93-718. Judicial standards commission — composition.** There is created a judicial standards commission consisting of five (5) members as follows:

(1) two (2) district court judges, from different judicial districts, elected by the district judges under an elective procedure initiated by and conducted by the supreme court and the two (2) so elected certified as to such election by the chief justice of the supreme court which for the purpose of the language of this act shall be considered as an appointment.

(2) one (1) attorney who has practiced law in this state for at least ten (10) years, appointed by the supreme court.

(3) two (2) citizens from different congressional districts who are not attorneys or judges of any court, active or retired, appointed by the governor.

**History:** En. Sec. 1, Ch. 95, L. 1973.

**Title of Act**

An act creating a judicial standards

commission and specifying the composition and the qualifications of the members in compliance with article VII, section 11 of the 1972 Montana constitution.

**93-719. Terms of office of commission members.** (1) The first appointments made under this act are as follows:

(a) the supreme court shall designate by certificate of the chief justice one (1) district court judge to serve for four (4) years, and one (1) to serve for two (2) years;

(b) the attorney shall serve for four (4) years; and

(c) the governor shall appoint one (1) citizen to serve for four (4) years, and one (1) to serve for two (2) years.

(2) Thereafter, all terms shall be for four (4) years.

History: En. Sec. 2, Ch. 95, L. 1973.

**93-720. Termination of membership—vacancy.** (1) Commission membership terminates if a member ceases to hold the position that qualified him for appointment.

(2) In the event a vacancy occurs on the commission, the appointing authority of the vacated seat shall designate a successor.

History: En. Sec. 3, Ch. 95, L. 1973.

**93-721. No compensation—travel expenses.** A commission member is not entitled to compensation for his services but is entitled to travel expenses, as provided for in 59-538, 59-539, and 59-801, as amended, incurred in the performance of his duties.

History: En. Sec. 4, Ch. 95, L. 1973;      **Amendments**  
amd. Sec. 30, Ch. 453, L. 1977.

The 1977 amendment substituted "travel expenses, as provided for in 59-538, 59-539, and 59-801, as amended" for "actual expenses."

**93-722. Investigation of judicial officers—complaint—hearing—disciplinary action.** (1) The commission, or any citizen of the state may upon good cause shown, initiate an investigation of any judicial officer in the state by filing a verified written complaint with the commission.

(2) The commission, after such investigation as it considers necessary and upon the finding of good cause, may:

(a) order a hearing to be held before it concerning the censure, suspension, removal or retirement of a judicial officer; or

(b) request the supreme court to appoint one (1) or more special masters, who are judges of courts of record, to hear and take evidence and to report to the commission.

(3) If after hearing or after considering the record and report of the masters, the commission finds the charges true, it shall recommend to the supreme court the censure, suspension, removal or retirement of the judicial officer.

History: En. Sec. 5, Ch. 95, L. 1973.

**93-723. Proceedings confidential—rules.** (1) All papers filed with, and proceedings before the commission or masters are confidential.

(2) The filing of papers with and the testimony given before the commission or masters is privileged communication.

(3) The commission shall make rules for the conduct of its affairs and provide for the confidentiality of its proceedings.

History: En. Sec. 6, Ch. 95, L. 1973.

**93-724. Determination and order by supreme court.** (1) The supreme court shall review the record of the proceedings and shall make such determination as it finds just and proper and may:

- (a) order censure, suspension, removal or retirement of a judicial officer, or
- (b) wholly reject the recommendation.

History: En. Sec. 7, Ch. 95, L. 1973.

**93-725. Nonparticipation of interested judicial officer.** A judicial officer who is a member of the commission or of the supreme court may not participate in any proceeding involving his own censure, suspension, removal, or retirement or that of his spouse, a relative within the sixth degree of consanguinity, or the spouse of such a relative.

History: En. Sec. 8, Ch. 95, L. 1973;  
amd. Sec. 31, Ch. 344, L. 1977.

**Amendments**

The 1977 amendment inserted "his spouse"; and made minor changes in phraseology and punctuation.

**93-726. Interim disqualification of judicial officer.** A judicial officer is disqualified from acting as such, without loss of salary, while there is pending:

- (1) an indictment or an information charging him with a crime punishable as a felony under Montana or federal law; or
- (2) a formal proceeding before the commission for his removal or retirement.

History: En. Sec. 9, Ch. 95, L. 1973;  
amd. Sec. 32, Ch. 344, L. 1977.

**Amendments**

The 1977 amendment substituted "judicial officer" for "judge"; and made minor changes in phraseology and punctuation.

**93-727. Suspension on conviction of crime—final disposition.** (1) On recommendation of the commission, the supreme court may suspend a judicial officer from office without salary when he pleads guilty or no contest or is found guilty of a crime punishable as a felony under Montana or federal law, or of any other crime involving moral turpitude.

(2) If his conviction is reversed, suspension terminates, and he shall be paid his salary for the period of suspension.

(3) If he is suspended and his conviction becomes final, the supreme court shall remove him from office.

History: En. Sec. 10, Ch. 95, L. 1973.

**93-728. Order for retirement—removal.** (1) Upon an order for retirement, the judicial officer shall be retired with the same rights and privileges as if he retired pursuant to statute.

(2) Upon an order for removal, the judicial officer shall be removed from office and his salary shall cease from the date of the order. He shall be ineligible for any other judicial office and pending further order of the court is suspended from practicing law.

History: En. Sec. 11, Ch. 95, L. 1973.

## CHAPTER 9—DISQUALIFICATION OF JUDICIAL OFFICERS

Section 93-903. No judicial officer to have partner practicing law.



93-901. (8868) Superseded—Supreme Court Rule, 34 State Reporter 26.

### Supersession

This section (Sec. 453, p. 134 Bannack Stat.; Sec. 180, C. Civ. Proc. 1895; Ch. 3, 2nd Ex. L. 1903; Sec. 1, Ch. 114, L. 1909; Sec. 1, Ch. 93, L. 1927; Sec. 1, Ch. 218, L. 1961; Sec. 1, Ch. 82, L. 1963; Sec. 1, Ch. 234, L. 1965; Sec. 2, Ch. 281, L. 1975), relating to cases in which judge may be disqualified and calling in another judge, is superseded by Supreme Court Rule, 34 State Reporter 26. The Rule is printed below.

### Supreme Court Rule

On December 29, 1976, the Supreme Court adopted the following rule effective March 1, 1977 and applicable to all actions filed on or after that date:

### DISQUALIFICATION AND SUBSTITUTION OF JUDGES

Any judge, or justice of the peace must not sit or act in any action or proceeding:

1. To which he is a party, or in which he is interested;

2. When he is related to either party by consanguinity or affinity within the sixth degree, computed according to the rules of law;

3. When he has been attorney or counsel for either party in the action or proceeding, or when he rendered or made the judgment, order or decision appealed from;

4. In a district court, when a motion for a substitution of a judge had been filed. In a civil case, each adverse party is entitled to two substitutions of a judge. In a criminal case, the state and each defendant is entitled to one substitution of a judge.

A motion for substitution of a judge shall be made by filing a written motion for substitution reading as follows: "The undersigned hereby moves for substitution of another judge for Judge \_\_\_\_\_ in this cause." The clerk of court shall immediately give notice thereof to all parties and to the judge named in the motion. Upon filing this said notice the judge named in the motion shall have no further power to act in the cause other than to call in another judge, which he shall do forthwith, and to set the calendar.

When a case is filed in a multi-judge district, it shall be the duty of the clerk of court to stamp the name of the judge to which the case is assigned on the face of the summons, order to show cause, or information and all copies thereof.

Whenever a judge is assigned a case for ten consecutive days and the attorneys of record on both sides have knowledge of the assignment for that period of time,

and if during this time no motion for substitution of a judge is filed against him, all rights to move for substitution of a judge shall be deemed waived by all parties, unless the presiding judge disqualified himself thereafter in which case the right to move for substitution of a new judge is reinstated and the ten day period starts running anew.

Whenever a new party enters a case, the ten day period begins anew as to that party. During that time all other parties may file any motions for substitution of a judge allowed by this rule and not previously filed by them.

Whenever an acceptance of jurisdiction is filed by a new judge it shall be the duty of the clerk of court, forthwith, to mail a copy thereof by certified mail with return receipt requested, to all attorneys of record. Service thereof may also be made by delivery of a copy personally, or by getting a written receipt from the attorneys therefor. Proof of service, however made, shall be stapled to the acceptance of jurisdiction, so served, in said file.

5. In a justice's, police or municipal court, when either party makes and files an affidavit that he cannot have a fair and impartial trial before such justice, police or municipal court judge by reason of the interest, prejudice or bias of the justice, police or municipal court judge.

Each adverse party is entitled to file one such disqualification in a civil or criminal case.

When such a disqualifying affidavit is filed, against a justice of the peace, the justice so named shall have no further power to act in the case, other than to call in another justice from the same county, or from an adjoining county if there is no other justice available in the same county, to hear the case.

When such a disqualifying affidavit is filed against a police judge he shall have no further power to act in the case except to call in a justice of the peace or qualified resident to act in his stead as prescribed in section 11-1604, R. C. M. 1947.

When such a disqualifying affidavit is filed against a judge of a municipal court, he shall have no further power to act in the case except to call in an attorney to act in his stead as prescribed in section 11-1713, R. C. M. 1947.

6. When he has been disqualified for cause as hereinafter described:

Whenever a party to any proceeding in any Court makes and files a timely and sufficient affidavit that a judge or justice of the peace, before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge or justice of

the peace shall proceed no further therein, but another judge or justice of the peace shall be assigned to hear such disqualification proceeding by the chief justice of the Supreme Court, or by a district judge, if the affidavit is against a justice of the peace, police or municipal court judge. The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than twenty days before the original date of trial, or good cause shall be shown for failure to file it within such time. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

7. When a new trial is ordered in any case, whether by order of the district court or the Supreme Court, each adverse party shall be entitled to file one motion for substitution of a judge in the manner

provided in paragraph 4, whether or not that party has previously filed motions for substitution of a judge. Such motions must be filed:

a. If the new trial has been ordered by the district court, within 10 days after the time for appealing the order has elapsed.

b. If the new trial has been ordered by the Supreme Court, within 10 days after notice of receipt of the remittitur has been received by the respective parties from the clerk of the district court.

8. The provisions of this rule shall not apply to any person in any cause involving a contempt of court.

9. This rule supersedes and is to be used to the exclusion of sections 93-901, 93-2906(4), 93-2907, 93-6602(2), 95-1709, and 95-2010, R. C. M. 1947.

**93-903. (8870) No judicial officer to have partner practicing law.** No judicial officer of a court of record may have a partner acting as attorney or counsel in any court of this state.

**History:** En. Sec. 456, p. 135, Bannack Stat.; re-en. Sec. 613, p. 159, Cod. Stat. 1871; re-en. Sec. 533, p. 179, L. 1877; re-en. Sec. 533, 1st Div. Rev. Stat. 1879; re-en. Sec. 550, 1st Div. Comp. Stat. 1887; amd. Sec. 182, C. Civ. Proc. 1895; re-en. Sec. 6317, Rev. C. 1907; re-en. Sec. 8870, R. C. M. 1921; amd. Sec. 33, Ch. 344, L. 1977. Cal. C. Civ. Proc. Sec. 172.

#### **Amendments**

The 1977 amendment substituted "judicial officer of a court of record" for "justice, judge, or other elective judicial official"; and made a minor change in phraseology.

## **CHAPTER 11—MISCELLANEOUS PROVISIONS RESPECTING COURTS AND JUDICIAL OFFICERS**

- Section 93-1107. Definitions.
- 93-1107.1. Retirement system.
  - 93-1109. [Transferred.]
  - 93-1110. Administrative expenses.
  - 93-1111. Payments into fund.
  - 93-1112. Powers and duties of board—protection of funds.
  - 93-1113. Membership.
  - 93-1114. Service allowance.
  - 93-1115. Payments by contributors.
  - 93-1116. Contributions by the state.
  - 93-1117. Vesting of proportional retirement.
  - 93-1118. Retirement allowance.
  - 93-1119. Disability retirement allowance.
  - 93-1120. Involuntary retirement allowance.
  - 93-1121. Penalty retirement allowance.
  - 93-1122. Refunds in case of resignation or discharge.
  - 93-1123. Payments upon death.
  - 93-1124. Payments in case of death from natural cause.
  - 93-1125. Monthly payments of retirement allowances.
  - 93-1126. Exemption from taxes and execution.
  - 93-1126.1. Withholding of group insurance premium from retirement benefit.
  - 93-1127. Nomination of beneficiary.
  - 93-1128. Military service.
  - 93-1129. Fraud—correction of errors.
  - 93-1130. Call of retired judge for duty.
  - 93-1131. Optional retirement allowance.
  - 93-1132. Transfer of dormant accounts to pension accumulation fund.

**93-1101. (8877) Subsequent applications for orders refused, etc.****Disqualification of Judge**

Motion for disqualification of judge was a flagrant abuse of this section where affidavit was filed three weeks subsequent to denial of petition for restoration to capacity and petition for restoration was again filed and oral argument heard on same evidence, resulting in granting of petition for restoration; writ

of supervisory control was issued ordering grant of guardian's motion to quash second petition. Application of Stewart, — M —, 517 P 2d 879.

**References**

Weinheimer v. Scott, 143 M 243, 388 P 2d 790.

**93-1102. (8878) Violations of preceding section.****Frivolous Appeal**

Where attorney specified as error in his appellate brief in a second action, the same point raised in his complaint in a previous action involving the same parties,

the appeal was frivolous and damages were assessed in favor of the respondents. Weinheimer v. Scott, 143 M 243, 388 P 2d 790.

**93-1107. Definitions.** Unless a different meaning is plainly implied by the context, the following definitions apply in this act:

(1) "Accumulated deductions" means the total of the amounts deducted from the salary of a contributor, paid into the fund and standing to his credit in the fund, together with the regular interest thereon.

(2) "Beneficiary" means the person who the contributor nominates by written designation, duly acknowledged and filed with the board.

(3) "Retired judge" means any judge or justice in receipt of a retirement allowance under this act.

(4) "Board" means the public employees' retirement board.

(5) "Penalty retirement age" means 70 years of age.

(6) "Contributor" means any person who has accumulated deductions in the fund standing to his credit.

(7) "Final salary" means the annual current salary for the office retired from.

(8) "Actuarial equivalent" means a benefit of equal value when computed upon the basis of the actuarial tables in use by the system.

(9) "Fund" means the Montana judges' retirement system agency account.

(10) "Involuntary retirement" means a retirement not for cause and before retirement age.

(11) "Member's annuity" means payments for life derived from contributions made by the contributor.

(12) "Retirement allowance" means the state annuity plus the member's annuity.

(13) "State annuity" means payments for life derived from contributions made by the state of Montana.

**History:** En. Sec. 1, Ch. 289, L. 1967; amd. Sec. 1, Ch. 218, L. 1969; amd. Sec. 1, Ch. 251, L. 1975; amd. Sec. 1, Ch. 63, L. 1977; amd. Sec. 5, Ch. 132, L. 1977.

of the 41st legislative assembly over the veto of the governor.

This section was amended twice in 1977, once by Ch. 63 and once by Ch. 132. Since the amendments do not appear to conflict, the code commissioner has made a composite section embodying the changes made by both amendments.

**Compiler's Notes**

Chapter 218, Laws 1969 was passed by the constitutional majority of both houses



**Title of Act**

An act relating to the judicial department of the state of Montana; providing for the retirement of district judges and justices of the supreme court, subject to thereafter being called into service for the performance of certain judicial duties under the direction of the supreme court and providing an allowance of actual expenses for such service; defining the terms used in this act; establishing a Montana judges' retirement system; creating a Montana judges' retirement board; providing for payment of the expense of administering this act, and for payments into the Montana judges' retirement fund; providing for the establishment and enforcement of rules and regulations; requiring membership in public employees' retirement system and for payments thereto by each judge not heretofore a member thereof; providing a service allowance based on length of service; requiring payments into the Montana judges' retirement fund by deductions from members' salaries; providing for contributions by the state of Montana, and for payment into the Montana judges' retirement fund of one-quarter of fees collected by clerks of district court and by the clerk of the supreme court; specifying length of service and age requirements necessary for retirement; providing the method of computing retirement allowance; providing for a disability retirement allowance and an involuntary retirement allowance; specifying penalty retirement age and providing for a retirement allowance forfeiture; providing for payments upon death; providing for monthly payments of retirement allowances, for exemption from taxes and execution, for nomination of beneficiary, and for options available to judges entering military service; providing certain optional methods of payment of retirement allowance; providing for transfer of accounts dormant for ten (10) years; and

providing a savings clause declaring the provisions of this act to be severable.

**Amendments**

The 1969 amendment rewrote the definition of "Final salary" which was formerly defined as "the annual current salary for the office retired from."

The 1975 amendment inserted "current" before "salary" in the definition of "Final salary"; and deleted "as of the date of retirement" from the end of the definition of "Final salary."

Chapter 63, Laws of 1977, deleted "or persons having an insurable interest in his life" in subdivision (2) after "person"; substituted "judge or justice" in subdivision (3) for "person"; substituted the definition of "actuarial equivalent" in subdivision (8) for a definition reading "the accumulated contributions and the present value of the member's state service based on length of service and member's attained age used to provide a life or temporary life income to the legally designated person, based on such person's attained age and sex at the time the option becomes available"; substituted "retirement system agency account" in subdivision (9) for "retirement fund"; and made minor changes in phraseology and style.

Chapter 132, Laws of 1977, substituted "public employees retirement board" in subdivision (4) for "Montana judges' retirement board"; and made minor changes in phraseology, punctuation and style.

**Repealing Clause**

Section 6 of Ch. 132, Laws 1977 read: "Sections 82A-210.1 and 82A-210.2, R. C. M. 1947, are repealed."

**Effective Date**

Section 7 of Ch. 132, Laws 1977 provided the act should be effective upon its passage and approval. Approved March 25, 1977.

**93-1107.1. Retirement system.** There is a retirement system known as the Montana judges' retirement system, which is governed by the provisions of 93-1107 through 93-1132.

**History:** En. 93-1107.1 by Sec. 2, Ch. 63, L. 1977.

**Title of Act**

An act to generally revise and clarify the laws relating to retirement of and

death and disability benefits for judges of district courts and justices of the supreme court; amending sections 93-1107, 93-1110, 93-1111, 93-1112, 93-1113, 93-1116, 93-1120, 93-1128, and 93-1131, R. C. M. 1947.

**93-1108. Repealed.****Repeal**

Section 93-1108 (Sec. 2, Ch. 289, L. 1967), relating to establishment of the

Montana judges' retirement system, was repealed by Sec. 103, Ch. 326, Laws of 1974.

**93-1109. [Transferred.]****Compiler's Notes**

Section 96, Ch. 326, Laws of 1974 re-numbered this section as sec. 82A-210.2.

**93-1110. Administrative expenses.** (1) The expense of the administration of this act, exclusive of the payment of retirement allowances and other benefits, shall be paid from the fund.

(2) Before July 15, 1970, and before July 15 of each year thereafter, the board shall compute the administrative costs for the immediately preceding fiscal year and transfer that amount from the fund to the public employees' retirement system account in the agency fund.

**History:** En. Sec. 4, Ch. 289, L. 1967; amd. Sec. 1, Ch. 23, L. 1969; amd. Sec. 3, Ch. 63, L. 1977.

eral fund, made on the basis of budgets submitted by the board" at the end and added subsection (2).

The 1977 amendment substituted "the fund" two places for "the Montana judges' retirement account"; substituted "agency fund" at the end of subsection (2) for "earmarked revenue fund"; and made a minor change in punctuation.

**Amendments**

The 1969 amendment designated the former section as subsection (1), and substituted "from the Montana judges' retirement account" for "by the state of Montana, by appropriation out of the gen-

**93-1111. Payments into fund.** All appropriations made by the state of Montana, all contributions by members, and all interest on and increase of the investments and moneys in the fund shall be paid to the public employees' retirement division of the department of administration, which shall credit the payments to the fund. These funds may be commingled with funds of the PERS, but separate accounts shall be maintained for the Montana judges' retirement system.

**History:** En. Sec. 5, Ch. 289, L. 1967; amd. Sec. 4, Ch. 63, L. 1977.

**Amendments**

The 1977 amendment deleted "of the Montana judges, in the amount hereinafter specified" after "contributions by members" near the beginning of the first sentence; substituted "in the fund" for "under this account" in the first sentence; substituted "public employees' retirement di-

vision of the department of administration" in the first sentence for "secretary of the public employees' retirement system board (PERS)"; deleted "Montana judges' retirement" before "fund" at the end of the first sentence; substituted "separate accounts shall be maintained for the Montana judges' retirement system" at the end of the second sentence for "shall be earmarked as judges' retirement fund"; and made minor changes in phraseology.

**93-1112. Powers and duties of board—protection of funds.** (1) The board is the trustee of all moneys collected for the retirement system and may establish such rules as it considers necessary. Within the limitations of this act, the board is charged with and is the authority as to its proper administration, operation, and enforcement. The board is the authority as to the conditions under which persons may become members of and receive benefits under the retirement system. All persons in similar circumstances shall be treated alike.

(2) The board shall keep such data as is necessary for actuarial valuation purposes. It shall cause to be made periodic actuarial investigations into the mortality and service experience of the contributors to and the beneficiaries of the fund and shall adopt for the retirement system one or more mortality tables.

(3) The assets of the retirement system may not be used for or diverted to any purpose other than for the exclusive benefit of the members and their beneficiaries and for paying the reasonable expenses of administering the retirement system.

(4) Upon termination of the retirement system, termination of employment of a substantial number of members which would constitute a partial termination of the retirement system, or complete discontinuance of contributions to the retirement system, the retirement allowance accrued to each member directly affected by such occurrence becomes fully vested and nonforfeitable to the extent funded.

**History:** En. Sec. 6, Ch. 289, L. 1967; amd. Sec. 5, Ch. 63, L. 1977; amd. Sec. 20, Ch. 332, L. 1977.

#### Compiler's Notes

This section was amended twice in 1977, once by Ch. 63 and once by Ch. 332. Since the amendments do not appear to conflict, the code commissioner has made a composite section embodying the changes made by both amendments.

#### Amendments

Chapter 63, Laws of 1977, deleted "and

regulations" after "rules" in the first sentence of subsection (1); and made minor changes in phraseology, punctuation and style.

Chapter 332, Laws of 1977, made the same changes as Ch. 63; inserted "is the trustee of all moneys collected for the retirement system and" in the first sentence of subsection (1); added the last sentence to subsection (1); added subsections (3) and (4); and made minor changes in phraseology, punctuation and style.

**93-1113. Membership.** (1) A judge or justice who was a member of the PERS prior to March 2, 1967, may elect to remain under that system by notifying the board of administration of the PERS in writing of the election on or before October 1, 1967.

(2) Every other judge of a district court or justice of the supreme court must be a member of the Montana judges' retirement system.

(3) A judge or justice who was in service in either a district court or the supreme court of the state of Montana prior to July 1, 1967, may elect to make back payments to the date when he first entered the service of the judiciary. The back payments may be spread over a period of 5 years by having the regular payroll deduction of the contributor increased in an amount equal to the total of his back payments divided by 60. The deduction increase shall be credited to the back payments owing and shall be continued until the full amount of the back payments has been paid. A deduction increase may be anticipated in part or in full by the contributor at any time. In order for the contributor to receive full credit for his service, it must be anticipated in full at the time of retirement. If it is not so anticipated and paid in full, the contributor's retirement allowance will be calculated for the total years and months on which contributions have been made in accordance with 93-1118. Every contributor who elects to make back payments shall receive full credit for all contributions made into the fund and for all service credits to which he might thereby be entitled.

**History:** En. Sec. 7, Ch. 289, L. 1967; amd. Sec. 6, Ch. 63, L. 1977.

#### Amendments

The 1977 amendment substituted "prior to March 2, 1967" in subsection (1) for "previous to the adoption of this act";

substituted "on or before October 1, 1967" in subsection (1) for "within three (3) months after the effective date of this act"; inserted subsection (2); and made minor changes in phraseology, punctuation and style.



**93-1114. Service allowance.** In computing the length of service of a contributor for retirement purposes, full credit shall be given to each contributor for each year of service rendered to the judiciary including service rendered prior to July 1, 1967, upon complying with the provisions of this act. As soon as practicable, the retirement board shall issue to each original member a certificate certifying the aggregate length of his service prior to July 1, 1967. Such certificate shall be final and conclusive as to his prior service unless thereafter modified by the board upon application of the contributor.

**History:** En. Sec. 8, Ch. 289, L. 1967.

**93-1115. Payments by contributors.** Every member shall be required to contribute into the fund a sum equal to six per cent (6%) of his monthly salary, which sum shall be deducted from his salary and credited to his account in the fund.

**History:** En. Sec. 9, Ch. 289, L. 1967.

**93-1116. Contributions by the state.** The state of Montana shall contribute monthly to the fund a sum equal to 6% of the salary of each member. In addition, the clerk of each district court shall transmit 60% of the fees collected under 25-232 to the state, which shall first deposit in the fund an amount equal to 20% of the salaries paid to district judges and supreme court justices who are covered by the judges' retirement system and then deposit the balance in the state general fund. The clerk of the supreme court shall pay one-fourth of the fees collected under 82-503 to the public employees' retirement division of the department of administration to be credited to the fund. The full amount of the fund as created and accumulated is hereby set aside to be used exclusively for the purpose of paying the retirement benefits and expenses provided for herein.

**History:** En. Sec. 10, Ch. 289, L. 1967; amd. Sec. 7, Ch. 63, L. 1977; amd. Sec. 2, Ch. 548, L. 1977.

#### Amendments

Chapter 63, Laws of 1977, as amended by Chapter 548, Laws of 1977, substituted the second and third sentences for two sentences reading: "In addition to the above, three-quarters ( $\frac{3}{4}$ ) of the fees collected under section 25-232, as amended, and section 25-233, as amended, shall be paid into the county treasurer on the first Monday of each month as provided in section 25-203, and the other one-quarter shall be transmitted by the clerk to the secretary of the PERS board on the first Monday of each month, and by him

credited to the judicial retirement fund. The fees collected under section 82-503, as amended, shall be by the clerk of the supreme court paid by him, three-quarters ( $\frac{3}{4}$ ) into the state treasury to be credited to the general fund, and one-quarter ( $\frac{1}{4}$ ) of which shall be paid by him to the secretary of the PERS board, which shall be credited to the credit of the judicial retirement fund"; substituted "retirement benefits" for "accrued retirement" in the last sentence; and made minor changes in phraseology, and style.

#### Repealing Clause

Section 3 of Ch. 548, Laws 1977 read "Section 25-233, R. C. M. 1947, is repealed."

**93-1117. Vesting of proportional retirement.** Any member who has completed at least five (5) years or more service, and has reached the age of sixty-five (65), may retire and receive the proportional retirement allowances provided in section 12 [93-1118].

**History:** En. Sec. 11, Ch. 289, L. 1967.

93-1118. **Retirement allowance.** Upon retirement from service a member shall receive a service retirement allowance which shall consist of the state annuity plus the member's annuity. The member's annuity shall be the actuarial equivalent of his aggregate contributions at the time of retirement and the state annuity shall be in an amount which, when added to the member's annuity, will provide a total retirement allowance of three and one-third per cent ( $3\frac{1}{3}\%$ ) per year of his final salary for the first fifteen (15) years' service, and one per cent (1%) per year for each year's service thereafter.

**History:** En. Sec. 12, Ch. 289, L. 1967.

93-1119. **Disability retirement allowance.** In case of the total disability of a contributor, permanent in character, regardless of length of service of the contributor, a disability retirement allowance shall be granted the contributor in an amount calculated on the actuarial equivalent of the member's annuity and the state annuity standing to his credit at the time of his disability retirement; provided, that if such total disability is a direct result of any service to the Montana judiciary in line of duty, then such judge or justice who is totally and permanently disabled shall be retired on total retirement allowance of a minimum of one-half ( $\frac{1}{2}$ ) of his final salary or the allowance provided in section 12 [93-1118], whichever is greater. In the event of any disability not caused in the line of duty after attaining the age of sixty (60) years, the maximum monthly payment shall be the retirement allowance as provided in section 12 [93-1118].

**History:** En. Sec. 13, Ch. 289, L. 1967.

93-1120. **Involuntary retirement allowance.** (1) If a contributor is involuntarily discontinued from service, after having completed 5 years of total service but before reaching retirement age, he shall, upon filing an application in the manner prescribed by the board, be paid whichever of the following allowances that he elects:

(a) the full amount of his accumulated deductions; or

(b) a member's annuity of equivalent actuarial value to his accumulated deductions, plus an annuity which is the actuarial equivalent of the present value of the state annuity then standing to his credit.

(2) If a contributor is involuntarily discontinued from service, after having completed 12 years of total service but before reaching retirement age, he shall, upon filing an application in the manner prescribed by the board, be paid whichever of the following allowances that he elects:

(a) the full amount of his accumulated deductions; or

(b) a member's annuity of equivalent actuarial value to his accumulated deductions, plus a state annuity in an amount which, when added to the member's annuity, will provide a total annuity equal to the allowance provided for in 93-1118.

**History:** En. Sec. 14, Ch. 289, L. 1967; amd. Sec. 1, Ch. 89, L. 1975; amd. Sec. 8, Ch. 63, L. 1977.

**Amendments**

The 1975 amendment inserted the subsection (1) designation; and added subsection (2).

The 1977 amendment substituted "manner prescribed by the board" in subsections (1) and (2) for "manner herein provided for retirement"; and made minor changes in phraseology, punctuation and style.

**93-1121. Penalty retirement allowance.** Any judge or justice who becomes eligible for retirement hereunder, but fails to make application therefor, prior to his attaining the age of seventy (70) years, shall automatically waive all retirement benefits, and shall receive a return of only such moneys equal to the accumulated deduction contributed by him; save and except that any judge or justice, who is over the age of seventy (70) years, at the time of the effective date of this act, or who shall attain such age before the expiration of his term, shall be permitted to serve out the balance of his existing term, without forfeiting said retirement. At the termination of the said existing term, if such member has failed to make application for retirement under this act, he shall automatically waive all retirement benefits hereunder, and shall receive a return of only such moneys equal to the accumulated deduction contributed by him.

**History:** En. Sec. 15, Ch. 289, L. 1967.

**Compiler's Notes**

This act became effective July 1, 1967.

**93-1122. Refunds in case of resignation or discharge.** Where a contributor resigns of his own volition, or is discharged for cause before becoming entitled to a retirement allowance, then the deductions standing to his credit shall be paid to him.

**History:** En. Sec. 16, Ch. 289, L. 1967.

**93-1123. Payments upon death.** If the board shall find that a contributor died as a direct and proximate result of injury received in the course of his employment, a retirement allowance shall be paid to his beneficiary. Such retirement allowance shall consist of:

(a) a member's annuity which shall be the actuarial equivalent of the contributor's accumulated deductions standing to his credit; and

(b) the actuarial equivalent of a state annuity which when added to the member's annuity will provide a total annuity equal to the allowance provided for in section 12 [93-1118].

**History:** En. Sec. 17, Ch. 289, L. 1967.

**93-1124. Payments in case of death from natural cause.** (a) If the retired judge or justice dies before receiving in payments the present value of his member's annuity and the state annuity as it was at the time of his retirement, the balance shall be paid to his beneficiary.

(b) If a member dies before reaching retirement age, his beneficiary shall be entitled to the actuarial equivalent of the options as provided in section 14 [93-1120].

**History:** En. Sec. 18, Ch. 289, L. 1967.

**93-1125. Monthly payments of retirement allowances.** The retirement allowances granted under the provisions of this act shall be paid in equal monthly installments and may not be increased, decreased, revoked or repealed unless by act of the legislature of the state of Montana. How-



ever, there may not be any duplication of benefits to a member or beneficiary due to there being more than one period of service of a member. No retirement allowances may be approved by the board while the member is drawing full compensation as a judge or justice.

**History:** En. Sec. 19, Ch. 289, L. 1967; amd. Sec. 21, Ch. 332, L. 1977.

**Repealing Clause**

Section 22 of Ch. 332, Laws 1977 read "Section 68-1425, R. C. M. 1947 is repealed."

**Amendments**

The 1977 amendment inserted the second sentence; and made minor changes in phraseology.

**93-1126. Exemption from taxes and execution.** Any money received or to be paid as a member's annuity, state annuity, or return of deductions or the right of any of these shall be exempt from any state or municipal tax and from levy, sale, garnishment, attachment, or any other process whatsoever and shall be unassignable except as specifically provided in 93-1126.1.

**History:** En. Sec. 20, Ch. 289, L. 1967; amd. Sec. 10, Ch. 214, L. 1977.

**Amendments**

The 1977 amendment added the exception at the end of the section; and made minor changes in punctuation.

**93-1126.1. Withholding of group insurance premium from retirement benefit.** A retiree who is a participant in an employee group insurance plan which permits participation in the group plan following retirement may elect to have the monthly premium for such group insurance withheld by the retirement system and paid directly by the system to the insurance carrier. In order to qualify for this withholding, a retiree must be a participant in a group insurance plan available to the employees of his former employer. No withholding may be made for any retiree covered by an individual insurance policy.

**History:** En. 93-1126.1 by Sec. 11, Ch. 214, L. 1977.

provided the act be effective on its passage and approval. Approved April 1, 1977.

**Effective Date**

Section 12 of Ch. 214, Laws of 1977

**93-1127. Nomination of beneficiary.** Every contributor shall have the authority to name his beneficiary by written designation duly acknowledged and filed with the board.

**History:** En. Sec. 21, Ch. 289, L. 1967.

**93-1128. Military service.** (1) A member of the Montana judiciary inducted into the armed forces of the United States has the option to:

- (a) continue his payments into the fund; or
- (b) allow the board to make his payments for him during his military service, in which event he must repay the fund the full amount of the payments within 2 years after his return to the Montana judiciary.

(2) If a member chooses one of the options in subsection (1) and meets its requirements, he shall be given credit for his service in the armed forces of the United States as if it were service in the judiciary.

**History:** En. Sec. 22, Ch. 289, L. 1967; amd. Sec. 9, Ch. 63, L. 1977.

#### **Amendments**

The 1977 amendment substituted "within 2 years after his return" in subdivision (1)(b) for "upon his return"; deleted "and such repayments must be made within

two (2) years after his return to the judiciary provided that a member's service in the armed forces of the United States shall be credited to and made a part of the member's service allowance" from the end of subdivision (1)(b); added subsection (2); and made minor changes in phraseology, punctuation and style.

**93-1129. Fraud—correction of errors.** (a) No person shall knowingly make any false statement, or shall falsify or permit to be falsified any record or records of the retirement system herein established in any attempt to defraud such system.

(b) Should any such change in records fraudulently made or any mistake in records inadvertently made result in any contributor or beneficiary receiving more or less than he would have been entitled to had the records been correct, then, on the discovery of such error, the board shall correct such error and shall adjust the payments which shall be made to the contributor or annuitant in such manner that the actuarial equivalent of the benefit to which he was correctly entitled shall be paid.

Any person violating any of the provisions of subsection (a) of this section shall be guilty of a misdemeanor, and, upon conviction, shall be sentenced to pay a fine not exceeding one thousand dollars (\$1,000) or suffer imprisonment not exceeding one (1) year, or both, in the discretion of the court.

**History:** En. Sec. 23, Ch. 289, L. 1967.

**93-1130. Call of retired judge for duty.** Every judge or justice receiving retirement pay under the provisions of this act, shall, if physically and mentally able, be subject to call by the supreme court or the chief justice thereof to aid and assist the supreme court or any district court under such directions as the supreme court may give, including the examination of the facts and cases before the court, the examination of authorities cited and the preparation of opinions for and on behalf of the court, which opinions, when and if and to the extent approved by the court, may by the court be ordered to constitute the opinion of such court and such court and such retired judge or justice may, subject to any rule which the supreme court may adopt, perform any and all duties preliminary to the final disposition of cases in so far as not inconsistent with the constitution of the state. Such retired judge or justice when called to service as herein provided shall be reimbursed for his actual expenses, if any, in responding to such call.

**History:** En. Sec. 24, Ch. 289, L. 1967.

**93-1131. Optional retirement allowance.** (1) A member or a beneficiary may elect one of the optional retirement allowances set forth in subsection (2) at any time before the first payment on account of any retirement allowance is made. If a member dies after retirement and within 30 days from the date upon which his election or changed election was received by the board the election is void and the death will be considered as that of a member before retirement.

(2) A member or a beneficiary may elect or, prior to the approval of a previous election, revoke or change the previous election and elect to receive the actuarial equivalent of his retirement allowance as of the date of retirement in a lesser retirement allowance payable throughout life with one of the following options:

(a) Option 1—upon his death, his lesser retirement allowance will be continued throughout the life of and paid to the person that he nominated by written designation, duly executed and filed with the board at the time of his retirement.

(b) Option 2—upon his death, one-half of his lesser retirement allowance will be continued throughout the life of and paid to the person that he nominated by written designation, duly executed and filed with the board at the time of his retirement.

(c) Option 3—such other benefits will be paid, either to his beneficiary or to any other person that he nominated, as, together with the lesser retirement allowance, are the actuarial equivalent of his retirement allowance and have been approved by the board.

**History:** En. Sec. 25, Ch. 289, L. 1967; amd. Sec. 10, Ch. 63, L. 1977.

#### Amendments

The 1977 amendment inserted "A member or a beneficiary may elect one of the optional retirement allowances set forth

in subsection (2) at any time" at the beginning of subsection (1); deleted "having an insurable interest in his life" after "person" in subdivisions (2)(a) and (2)(b); and made minor changes in phraseology, punctuation and style.

**93-1132. Transfer of dormant accounts to pension accumulation fund.** The board may in its discretion transfer the savings account of a member to the pension accumulation fund if the account has been dormant for a period of ten (10) years, provided that no right of the member shall be jeopardized by such transfer and the savings account shall be transferred to the member's name upon subsequent re-entry to membership.

**History:** En. Sec. 27, Ch. 289, L. 1967.

#### Separability Clause

Section 26 of Ch. 289, Laws 1967 read "The provisions of this act are severable, and, if any of its provisions shall be held to be unconstitutional, the decision of the

court shall not affect or impair any of the remaining provisions. It is hereby declared to be the legislative intent that this act would have been adopted had such unconstitutional provisions not been included herein."

## CHAPTER 12—JURIES—DIFFERENT KINDS DEFINED

Section 93-1203. Grand jury defined.

93-1205. Number of a trial jury.

**93-1203. (8885) Grand jury defined.** A grand jury is a body of persons, 11 in number, returned as provided by law from the citizens of a county before a court of competent jurisdiction and sworn to inquire into public offenses committed or triable within the county.

**History:** En. Sec. 222, C. Civ. Proc. 1895; re-en. Sec. 6332, Rev. C. 1907; re-en. Sec. 8885, R. C. M. 1921; amd. Sec. 2, Ch. 203, L. 1939; amd. Sec. 34, Ch. 344, L. 1977. Cal. C. Civ. Proc. Sec. 192.

#### Amendments

The 1977 amendment increased the number of persons constituting a grand jury from seven to eleven; and made minor changes in phraseology and punctuation.



**93-1205. (8887) Number of a trial jury.** A trial jury consists of twelve (12) persons; provided, that in civil actions and cases of misdemeanor, it may consist of twelve (12), or any number less than twelve (12), upon which the parties may agree in open court, and further provided that in all civil actions where the relief asked for in the complaint is under the sum of ten thousand dollars (\$10,000), then a trial jury may in the discretion of the trial judge consist of six (6) persons, and that two-thirds ( $\frac{2}{3}$ ) of the jury may render a verdict; provided further, that where a six (6) person jury is authorized by law, each side shall have two (2) peremptory challenges, and they shall be exercised by the plaintiff first striking one (1), and the defendant then striking one (1), and so on, until each side has exhausted or waived his rights.

**History:** En. Sec. 224, C. Civ. Proc. 1895; re-en. Sec. 6334, Rev. C. 1907; re-en. Sec. 8887, R. C. M. 1921; amd. Sec. 4, Ch. 203, L. 1939; amd. Sec. 1, Ch. 293, L. 1971. Cal. C. Civ. Proc. Sec. 194.

#### Amendments

The 1971 amendment added the second and third provisos; and made minor changes in style.

### 93-1206. (8888) Juries in justices' courts.

#### Cross-References

Formation of criminal trial jury in justice or police court, sec. 95-2005.

Trial of criminal cases in justice and police courts, sec. 95-2004.

## CHAPTER 13—JURORS—QUALIFICATIONS AND EXEMPTIONS

Section 93-1301. Who competent to act as juror.

93-1304. Who exempt from jury duty.

**93-1301. Who competent to act as juror.** A person is competent to act as a juror if he is a registered elector whose name appears on the most recent list of all registered electors as prepared by the county registrar.

**History:** Earlier statutes were Sec. 8, p. 506, Cod. Stat. 1871; amd. Sec. 1, p. 70, L. 1873; re-en. Sec. 780, 5th Div. Rev. Stat. 1879; amd. Sec. 1, p. 57, L. 1881; re-en. Sec. 1304, 5th Div. Comp. Stat. 1887; re-en. Sec. 230, C. Civ. Proc. 1895; re-en. Sec. 6337, Rev. C. 1907; re-en. Sec. 8890, R. C. M. 1921; amd. Sec. 6, Ch. 203, L. 1939; amd. Sec. 1, Ch. 116, L. 1965; amd. Sec. 20, Ch. 240, L. 1971; amd. Sec. 32, Ch. 94, L. 1973; amd. Sec. 2, Ch. 298, L. 1975. Cal. C. Civ. Proc. Sec. 198.

#### Amendments

The 1965 amendment deleted "and not more than seventy" after "age of twenty-one" in paragraph 1.

The 1971 amendment reduced the minimum age specified in subdivision 1 from 21 to 19 years; and made minor changes in style.

The 1973 amendment reduced the minimum age specified in subdivision 1 from nineteen to eighteen years.

The 1975 amendment substituted the current section for a specific list of qualifications. For prior version, see parent volume and prior amendment notes.

#### Repealing Clause

Section 2 of Ch. 116, Laws 1965 repealed all acts and parts of acts in conflict therewith.

**93-1304. (8893) Who exempt from jury duty.** (1) A person is exempt from liability to act as a juror if he is:

(a) a judicial, civil, or military officer of the United States or of this state;

(b) a person holding a public office in this state or in a county, city, or town of this state;

- (c) an attorney in practice;
- (d) a member of the clergy of any religion following his profession;
- (e) an editor following his profession;
- (f) a teacher in a university, college, academy, or school;
- (g) an employee of the Montana state school for the deaf and blind;
- (h) a practicing physician, dentist, or druggist actually engaged in the business of dispensing medicines;
- (i) a regularly licensed embalmer or undertaker;
- (j) an officer, keeper, or attendant of a hospital, mental health facility, or other charitable institution;
- (k) an officer or attendant of the state prison or a county jail on active duty;
- (l) an express agent, mail carrier, or superintendent, employee, or operator of a telegraph line doing general telegraph business in this state;
- (m) an active member of the national guard of Montana;
- (n) an active member of a fire department of any city or town of this state;
- (o) a superintendent on a railroad;
- (p) a nurse engaged in a case; or
- (q) a person caring directly for one or more children.

(2) The number of firefighters exempted under subsection (1)(n) may not exceed 28, including officers, for each company organized. The exempt members shall be selected from the roll of each company according to the seniority of membership. The secretary of each company shall make a list of the exempt members and file it with the clerk of the board of county commissioners on the first Mondays of March, June, September, and December. Failure to file the list is considered a waiver of the exemption.

(3) When a person claims exemption under subsection (1)(g), the certificate of the superintendent of the school, under the official seal of the school, is sufficient evidence of qualified employment.

(4) The court must discharge a person from serving as a trial juror in either of the following cases:

(a) when it satisfactorily appears that the person is not competent; or

(b) when it satisfactorily appears that the person is exempt and claims the benefit of exemption.

**History:** Ap. p. Sec. 9, p. 506, Cod. Stat. 1871; re-en. Sec. 781, 5th Div. Rev. Stat. 1879; amd. Sec. 1, p. 56, L. 1881; amd. Sec. 1, p. 101, L. 1883; re-en. Sec. 1305, 5th Div. Comp. Stat. 1887; amd. Sec. 232, C. Civ. Proc. 1895; re-en. Sec. 6339, Rev. C. 1907; amd. Sec. 1, Ch. 20, L. 1917; re-en. Sec. 8893, R. C. M. 1921; amd. Sec. 7, Ch. 203, L. 1939; amd. Sec. 1, Ch. 425, L. 1971; amd. Sec. 35, Ch. 344, L. 1977. Cal. C. Civ. Proc. Sec. 200.

#### Amendments

The 1971 amendment inserted "in the

state" in subdivision 2; deleted "almshouse" in subdivision 7; and made minor changes in phraseology and style.

The 1977 amendment inserted the subsection (1) designation at the beginning of the section; redesignated former subdivisions 1 to 3 as subdivisions (1)(a) to (1)(c); substituted "city" for "township" in subdivision (1)(b); added "of this state" to subdivision (1)(b); redesignated former subdivision 4 as subdivisions (1)(d) and (1)(e); redesignated former subdivision 5 as subdivision (1)(f); inserted subdivision (1)(g); redesignated former

subdivision 6 as subdivisions (1)(h) and (1)(i); redesignated former subdivisions 7 to 9 as subdivisions (1)(j) to (1)(l); redesignated former subdivision 10 as subdivisions (1)(m), (1)(n) and subsection (2); redesignated former subdivision 11 as subdivision (1)(o); redesignated

former subdivision 12 as subdivisions (1)(p) and (1)(q); inserted subsection (3); designated the former last paragraph as subsection (4); and made minor changes in phraseology, punctuation and style.

## CHAPTER 14—JURORS—SELECTION AND RETURN

Section 93-1402. Selection of persons qualified to serve as trial jurors.

93-1404. Duty of clerk—jury box.

### 93-1401. (8896) Jury lists, by whom and when to be made.

#### Judicial Interpretation

Where statutes concerning jury selection procedures were amended, but provision of this section for date of meetings to select jurors was not changed, resulting in apparent discrepancy, amendments

were constitutional and required that jury commissions meet as soon as possible after effective date to prepare new jury lists. *State ex rel. Bennick v. District Court*, — M —, 538 P 2d 1369.

**93-1402. (8897) Selection of persons qualified to serve as trial jurors.** At the meeting, specified in the last section, the officers present must select, from the most recent list of all registered electors as prepared by the county registrar, and make a list of the names of all persons qualified to serve as trial jurors, as prescribed in the last chapter. Each name so appearing on said list shall be assigned a number which shall be placed opposite the name on the jury list and shall be considered the number of the juror opposite whose name it appears. Said numbers shall be consecutive from "1" to the total number of jurors.

**History:** En. Sec. 241, C. Civ. Proc. 1895; re-en. Sec. 6343, Rev. C. 1907; amd. Sec. 1, Ch. 80, L. 1919; re-en. Sec. 8897, R. C. M. 1921; amd. Sec. 1, Ch. 168, L. 1957; amd. Sec. 1, Ch. 298, L. 1975.

#### Constitutionality

Where, prior to the 1975 amendment, members of jury were selected from property tax rolls and this list comprised 80% of population in that county, it reasonably reflected cross section of population, and there was no denial of impartial jury. *State v. Taylor*, — M —, 542 P 2d 100.

#### Amendments

The 1975 amendment substituted "most recent list of all registered electors as prepared by the county registrar" for "last assessment roll of the county" in the first sentence.

**93-1404. (8899) Duty of clerk—jury box.** The clerk shall prepare and keep a jury box and contents as prescribed in this section. The number of each juror shall be written, typed, or stamped on a slip of paper or other suitable material, identical in all respects to the slips used for the other numbers. The slips shall be placed in a box of ample size to permit them to be thoroughly mixed. The box shall be plainly marked, "jury box". The slips may be used as often as necessary, except that none may be used which is in any manner defaced or disfigured or so marked that it may be recognized or distinguished from the others in the jury box except by the number thereon. The box shall contain only one slip for each number corresponding to the number before the name of each juror on the jury list.



**History:** En. Sec. 243, C. Civ. Proc. 1895; re-en. Sec. 6345, Rev. C. 1907; amd. Sec. 1, Ch. 35, L. 1919; re-en. Sec. 8899, R. C. M. 1921; amd. Sec. 2, Ch. 168, L. 1957; amd. Sec. 1, Ch. 110, L. 1969; amd. Sec. 56, Ch. 344, L. 1977. Cal. C. Civ. Proc. Sec. 209.

#### Amendments

The 1969 amendment deleted "and enclosed in separate black capsules" after "suitable material"; substituted references to "numbers" for references to "capsules" wherever appearing; and, in the last sentence, substituted "number before the name of each juror" for "corresponding to the name of each juror."

The 1977 amendment substituted "stamped on a slip of paper" in the second sentence for "stamped on paper"; added "to the slips used for the other numbers" to the second sentence; substituted "jury box" for "jury box No. 1" in the fourth and fifth sentences; substituted "slips" for "numbers" at the beginning of the fifth sentence; substituted "one slip for each number" in the last sentence for "one number, and only one number"; and made minor changes in phraseology and punctuation.

### DECISIONS UNDER FORMER LAW

#### Color of Capsules

Identical opaque capsules, though not black as formerly required by statute, were not such deviation as to constitute material departure from provisions of statute since the price of black capsules was approximately five times that of other avail-

able capsules, and hence an additional burden on taxpayer, and since no unfairness in selection of jurors would result from using another opaque colored capsule. In re Jury Box Capsules, 150 M 583, 447 P 2d 687.

### CHAPTER 15—JURORS—DRAWING AND SUMMONING FOR COURTS OF RECORD

- Section 93-1502. District judge to draw jury.  
 93-1503. Drawing—how conducted.  
 93-1512. Obtaining additional jurors when necessary.

**93-1502. (8903) District judge to draw jury.** Immediately after the order mentioned in 93-1501 has been made, the district judge shall in the presence of the clerk of the court proceed to draw the jurors by number from the jury box.

**History:** En. Sec. 261, C. Civ. Proc. 1895; re-en. Sec. 6349, Rev. C. 1907; re-en. Sec. 8903, R. C. M. 1921; amd. Sec. 1, Ch. 151, L. 1937; amd. Sec. 1, Ch. 3, L. 1939; amd. Sec. 3, Ch. 168, L. 1957; amd. Sec. 57, Ch. 344, L. 1977. Cal. C. Civ. Proc. Sec. 215.

#### Amendments

The 1977 amendment deleted "No. 1" after "jury box"; and made minor changes in phraseology.

**93-1503. (8904) Drawing—how conducted.** (1) The clerk shall place the box on a rod so that it may readily revolve. The box must be revolved a sufficient number of times to ensure that the numbered slips in it become thoroughly mixed. Thereafter the judge shall draw from the box, one at a time, as many of the numbered slips as are ordered by the court.

(2) A record of the drawing shall be entered in the minutes of the court. It must show the names of the jurors corresponding to the numbers drawn from the jury box.

(3) If the court is satisfied that any person whose name is drawn is deceased or mentally incompetent or has permanently moved from the county, the name of the person shall be omitted from the list and another

name shall be drawn in its place. The reason for the omission shall be entered upon the minutes of the court. The same procedure shall be followed as often as may be necessary, until the number of names of jurors required have been drawn.

(4) After the drawing has been completed, the clerk shall make a copy of the list of names drawn and certify the same. In his certificate he shall state the date of the order and of the drawing, the number of the names drawn, and the time when and the place where the jurors are required to appear.

(5) The certificate and list shall be delivered to the sheriff for service.

(6) No person may be asked to serve for more than one term during any year unless all the numbers in the jury box have been drawn and there are no other qualified jurors available.

**History:** En. Sec. 262, C. Civ. Proc. 1895; re-en. Sec. 6350, Rev. C. 1907; amd. Sec. 2, Ch. 35, L. 1919; re-en. Sec. 8904, R. C. M. 1921; amd. Sec. 1, Ch. 148, L. 1933; amd. Sec. 2, Ch. 151, L. 1937; amd. Sec. 2, Ch. 3, L. 1939; amd. Sec. 4, Ch. 168, L. 1957; amd. Sec. 2, Ch. 110, L. 1969; amd. Sec. 36, Ch. 344, L. 1977. Cal. C. Civ. Proc. Sec. 219.

#### Amendments

The 1969 amendment, in subsection (1), twice substituted "numbered slips"

for "capsules," the latter referring to separate black capsules containing each juror's number; substituted "the" for "such" before the last reference to "numbered slips"; and added subsection (4).

The 1977 amendment redesignated former subsection 3 as subsections (3) to (5); substituted "mentally incompetent" in subsection (3) for "insane"; redesignated former subsection 4 as subsection (6); deleted "No. 1" after "jury box" in subsection (6); and made minor changes in phraseology, punctuation and style.

#### 93-1504 to 93-1506. (8905 to 8907) Repealed.

##### Repeal

Sections 93-1504 to 93-1506 (Secs. 263 to 265, C. Civ. Proc. 1895; Secs. 3 to 5, Ch. 35, L. 1919; Sec. 2, Ch. 148, L. 1933;

Secs. 5 to 7, Ch. 168, L. 1957), relating to the drawing of jurors from jury boxes Nos. 2 and 3, were repealed by Sec. 4, Ch. 110, Laws 1969.

#### 93-1510, 93-1511. (8911, 8912) Repealed.

##### Repeal

Sections 93-1510 and 93-1511 (Secs. 281, 282, C. Civ. Proc. 1895; Secs. 8, 9,

Ch. 168, L. 1957), relating to the drawing and summoning of jurors, were repealed by Sec. 4, Ch. 110, Laws 1969.

**93-1512. Obtaining additional jurors when necessary.** Whenever it appears to a district judge that additional jurors will be needed for any term or trial, the judge shall draw as many numbers from the jury box as are necessary to secure the required number of additional jurors. Before drawing the numbers, the judge shall by appropriate order designate the number of jurors needed, and when the judge believes that securing the additional jurors from all of the county would cause unnecessary delay or expenses, he may order the jurors selected from only a designated portion of the county, which portion shall never be less than the corporate limits of the county seat. If, in the selection of the additional jurors, a number is drawn and the jury list shows the person represented by the number to be a resident of an area outside the area designated by the court order, that number shall be returned to the jury box and a new number drawn. When the required number of names have been selected, the judge may order the prospective jurors notified by telephone by the clerk of the

court or he may order them summoned by the sheriff either by certified mail or by personal service.

History: En. Sec. 3, Ch. 110, L. 1969; amd. Sec. 58, Ch. 344, L. 1977.

#### Title of Act

An act amending sections 93-1404 and 93-1503, R. C. M. 1947, to provide for a change in the method of drawing jurors and to eliminate the jury boxes numbered two and three and to provide for a change in the method of notifying jurors; repealing sections 93-1504, 93-1505, 93-1506, 93-1510 and 93-1511, R. C. M. 1947.

#### Amendments

The 1977 amendment deleted "No. 1" after "jury box" in the first sentence; and made minor changes in phraseology and punctuation.

#### Repealing Clause

Section 4 of Ch. 110, Laws 1969 read "Sections 93-1504, 93-1505, 93-1506, 93-1510, and 93-1511, R. C. M. 1947, are repealed."

### CHAPTER 16—JURORS—SUMMONING FOR JUSTICES' AND INFERIOR COURTS AND COURTS OF INQUEST

Section 93-1602. How to be summoned.

93-1603. Officer's return.

**93-1602. (8914) How to be summoned.** Such jurors must be summoned from the persons competent to serve as jurors, residents of the county, city, or town in which such court has jurisdiction, by notifying them orally that they are summoned, and of the time and place at which their attendance is required.

History: En. Sec. 291, C. Civ. Proc. 1895; re-en. Sec. 6360, Rev. C. 1907; re-en. Sec. 8914, R. C. M. 1921; amd. Sec. 14, Ch. 491, L. 1973. Cal. C. Civ. Proc. Sec. 231.

#### Amendments

The 1973 amendment substituted "county" for "township."

**93-1603. (8915) Officer's return.** The officer summoning the jurors shall, at the time fixed in the order for their appearance, return the order to the court with a list of the persons summoned endorsed thereon.

History: En. Sec. 292, C. Civ. Proc. 1895; re-en. Sec. 6361, Rev. C. 1907; re-en. Sec. 8915, R. C. M. 1921; amd. Sec. 37, Ch. 344, L. 1977. Cal. C. Civ. Proc. Sec. 232.

#### Amendments

The 1977 amendment made minor changes in phraseology.

### CHAPTER 18—JURIES—HOW IMPANELED—ALTERNATES

Section 93-1801. Grand jury—when and how drawn and summoned.

93-1802. How constituted.

93-1803. Manner of impaneling grand jury.

93-1805. Clerk to call list of jurors summoned, prepare capsules.

93-1806. Manner of impaneling.

93-1809. Manner of impaneling.

**93-1801. (8918) Grand jury—when and how drawn and summoned.** Whenever in the opinion of the district judge a grand jury is necessary, he must make an order directing a grand jury to be drawn and summoned to attend before the court. The order must specify the number of jurors to be drawn, which must not be less than 15 or more than 20. The names of the jurors must be drawn from the jury box mentioned in 93-1404. The list of names shall be certified and the jurors summoned in the same



manner as for trial jurors. The names of any persons drawn who are not impaneled on the grand jury must be again placed in the jury box.

**History:** En. Sec. 320, C. Civ. Proc. 1895; re-en. Sec. 6364, Rev. C. 1907; re-en. Sec. 8918, R. C. M. 1921; amd. Sec. 4, Ch. 3, L. 1973; amd. Sec. 59, Ch. 344, L. 1977. Cal. C. Civ. Proc. Sec. 241.

The 1977 amendment deleted "No. 1" after "jury box" in two places; and made minor changes in phraseology, punctuation and style.

#### Repealing Clause

Section 60 of Ch. 344, Laws 1977 read "Sections 11-1709, 16-3606, 93-221 through 93-233, 93-703, and 93-7608, R. C. M. 1947, are repealed."

#### Amendments

The 1973 amendment increased the number of jurors specified in the second sentence from not less than ten nor more than fifteen to not less than fifteen nor more than twenty.

**93-1802. (8919) How constituted.** (1) When 11 of the persons summoned as grand jurors who are competent and not excused are present, they constitute the grand jury.

(2) When more than 11 are present, the clerk shall write their names on separate ballots and place the ballots in black capsules. The capsules shall be deposited in a box large enough to hold all of the capsules without crowding. The box shall be so arranged that the clerk drawing the capsules from the box is unable to see the capsule he is about to draw. The clerk shall draw 11 capsules. The persons whose names are on the ballots so drawn shall constitute the grand jury.

(3) When less than 11 are present, the court shall order a sufficient number to be immediately drawn from the jury box and summoned to attend the court.

**History:** En. Sec. 321, C. Civ. Proc. 1895; re-en. Sec. 6365, Rev. C. 1907; amd. Sec. 7, Ch. 35, L. 1919; re-en. Sec. 8919, R. C. M. 1921; amd. Sec. 5, Ch. 3, L. 1973; amd. Sec. 38, Ch. 344, L. 1977. Cal. C. Civ. Proc. Sec. 242.

#### Amendments

The 1973 amendment increased the number of jurors specified from seven to eleven in four places; and made minor changes in phraseology.

The 1977 amendment inserted the sub-

section designations; substituted "shall order" for "may order" in subsection (3); deleted a sentence at the end of subsection (3) reading "And whenever, of the persons to complete a grand jury, more attend than are required, the requisite number must be obtained by writing the names of those so summoned and not excused on ballots, which the ballots shall be placed in black capsules, and thereafter deposited in a box, and then drawn as above provided"; and made minor changes in phraseology, punctuation and style.

**93-1803. (8920) Manner of impaneling grand jury.** After the jurors have been selected, the grand jury shall be impaneled as prescribed in 95-1401 through 95-1403.

**History:** En. Sec. 322, C. Civ. Proc. 1895; re-en. Sec. 6366, Rev. C. 1907; re-en. Sec. 8920, R. C. M. 1921; amd. Sec. 39, Ch. 344, L. 1977. Cal. C. Civ. Proc. Sec. 243.

#### Amendments

The 1977 amendment rewrote this section. For prior version, see parent volume.

**93-1805. (8922) Clerk to call list of jurors summoned, prepare capsules.** At the opening of court on the day trial jurors have been summoned to appear, the clerk shall call the names of those summoned and the court may hear the excuses of jurors summoned.

(2) The clerk shall write the names of the jurors present and not excused on separate ballots, fold the ballots so that the names are concealed,

and place them in black capsules. In the presence of the court, the clerk shall deposit the capsules containing the ballots in a box large enough to hold all of the capsules without crowding. The box shall be so arranged that the judge drawing the capsules from the box is unable to see the capsules he is about to draw. The box must be kept sealed or locked until ordered by the court to be opened.

**History:** En. Sec. 330, C. Civ. Proc. 1895; re-en. Sec. 6368, Rev. C. 1907; amd. Sec. 8, Ch. 35, L. 1919; re-en. Sec. 8922, R. C. M. 1921; amd. Sec. 40, Ch. 344, L. 1977. Cal. C. Civ. Proc. Sec. 246.

#### Amendments

The 1977 amendment substituted refer-

ences to ballots throughout the section for references to slips and to ballots and slips; substituted "judge" in the third sentence of the second paragraph for "clerk"; and made minor changes in phraseology and punctuation.

**93-1806. (8923) Manner of impaneling.** (1) Whenever a civil action is called by the court for trial and a jury is required, the trial jury shall be impaneled as prescribed in 93-5001 through 93-5015.

(2) When the action is a criminal one, the jury shall be impaneled as prescribed in Title 95.

**History:** En. Sec. 331, C. Civ. Proc. 1895; re-en. Sec. 6369, Rev. C. 1907; re-en. Sec. 8923, R. C. M. 1921; amd. Sec. 41, Ch. 344, L. 1977. Cal. C. Civ. Proc. Sec. 247.

#### Amendments

The 1977 amendment substituted "Title 95" at the end of the section for "Title 94"; and made minor changes in phraseology, punctuation and style.

**93-1809. (8926) Manner of impaneling.** The jury shall be impaneled as provided in:

(a) Title 95, if the action is a criminal one;

(b) Sections 93-5001 through 93-5015, if the action is a civil one.

**History:** En. Sec. 341, C. Civ. Proc. 1895; re-en. Sec. 6371, Rev. C. 1907; re-en. Sec. 8926, R. C. M. 1921; amd. Sec. 42, Ch. 344, L. 1977. Cal. C. Civ. Proc. Sec. 251.

#### Amendments

The 1977 amendment rewrote this section. For prior version, see parent volume.

## CHAPTER 19—COURT REPORTERS

Section 93-1903. Matters written out and filed.

93-1904. Copies of proceedings.

93-1906. Salary and expenses—apportionment.

**93-1903. (8930) Matters written out and filed.** All objections made during the trial or hearing and the rulings, decisions, and opinions of the court must be written out at length or printed in type by the reporter and filed with the clerk immediately after the close of the trial or hearing.

**History:** En. Sec. 372, C. Civ. Proc. 1895; re-en. Sec. 6375, Rev. C. 1907; re-en. Sec. 8930, R. C. M. 1921; amd. Sec. 3, Ch. 22, L. 1961; amd. Sec. 43, Ch. 344, L. 1977. Cal. C. Civ. Proc. Sec. 269.

#### Amendments

The 1977 amendment deleted "and the

exceptions taken" after "court"; deleted "and thereafter such exceptions may be settled in a bill of exceptions as provided in section 93-5505" from the end of the section; and made minor changes in phraseology and punctuation.

**93-1904. (8931) Copies of proceedings.** (1) Each reporter must furnish, upon request, with all reasonable diligence, to the defendant in a

criminal case or a party or his attorney in a civil case in which he has attended the trial or hearing a copy, written out at length or in narrative form from his stenographic notes, of the testimony and proceedings upon the trial or hearing, or a part thereof, upon payment by the person requiring the same of 7½ cents per folio.

(2) If the county attorney, attorney general, or judge requires a copy in a criminal case, the reporter is entitled to his fees therefor, but he must furnish it. Upon furnishing it, he shall receive a certificate of the sum to which he is so entitled, which is a county charge and must be paid by the county treasurer upon the certificate like other county charges.

(3) If the judge requires a copy in a civil case to assist him in rendering a decision, the reporter must furnish the same without charge therefor. In civil cases, all transcripts required by the county shall be furnished without cost.

(4) If it appears to the judge that a defendant in a criminal case is unable to pay for a copy, it shall be furnished to him and paid for by the county.

**History:** En. Sec. 373, C. Civ. Proc. 1895; re-en. Sec. 6376, Rev. C. 1907; re-en. Sec. 8931, R. C. M. 1921; amd. Sec. 4, Ch. 22, L. 1961; amd. Sec. 1, Ch. 163, L. 1963; amd. Sec. 44, Ch. 344, L. 1977.

#### Amendments

The 1977 amendment added the last sentence to subsection (3); and made minor changes in phraseology, punctuation and style.

**93-1906. (8933) Salary and expenses—apportionment.** (1) Each reporter is entitled to receive an annual salary of not less than \$12,500 or more than \$16,000 and no other compensation except as provided in 93-1904. The salary shall be set by the judge in the district in which the reporter works. It is payable in monthly installments out of the general funds of the counties comprising the district for which the reporter is appointed, in proportion to the number of civil and criminal actions commenced in the district court in and for each county in the preceding year. The judge of the district shall, on January 1 of each year or as soon thereafter as possible, apportion the amount of the salary to be paid by each county in his district on the basis prescribed in this subsection.

(2) In judicial districts comprising more than one county, the reporter is allowed, in addition to the salary and fees provided for in subsection (1), his actual and necessary expenses of transportation and living when he goes on official business to a county of his judicial district other than the county in which he resides, from the time he leaves his place of residence until he returns thereto. The expenses shall be apportioned and payable in the same way as the salary.

**History:** En. Sec. 375, C. Civ. Proc. 1895; re-en. Sec. 6378, Rev. C. 1907; amd. Sec. 1, Ch. 80, L. 1909; re-en. Sec. 8933, R. C. M. 1921; amd. Sec. 1, Ch. 36, L. 1927; amd. Sec. 1, Ch. 73, L. 1945; amd. Sec. 1, Ch. 49, L. 1951; amd. Sec. 1, Ch. 125, L. 1953; amd. Sec. 1, Ch. 76, L. 1955; amd. Sec. 6, Ch. 22, L. 1961; amd. Sec. 1, Ch. 114, L. 1965; amd. Sec. 1, Ch. 221, L. 1967; amd. Sec. 1, Ch. 192, L. 1969; amd. Sec. 1, Ch. 183, L. 1973; amd.

Sec. 1, Ch. 373, L. 1975; amd. Sec. 45, Ch. 344, L. 1977. Cal. C. Civ. Proc. Secs. 271 and 274.

#### Amendments

The 1965 amendment increased the salary set forth near the beginning of the section from \$6,600 to \$7,800.

The 1967 amendment increased the annual salaries of court reporters from \$7,800 to \$8,800.



The 1969 amendment increased annual salaries of court reporters from \$8,800 to \$9,200.

The 1973 amendment increased the reporter's annual salary from \$9,200 to \$12,500.

The 1975 amendment increased the annual salary from \$12,500 to not less than \$12,500 and not more than \$16,000; and inserted "said salary to be set by

the judge in the district in which the reporter works."

The 1977 amendment deleted a proviso at the end of the second sentence of subsection (1) reading "provided, however, that all transcripts and bills of exceptions required by the county shall be furnished without cost"; and made minor changes in phraseology, punctuation and style.

## CHAPTER 20—ATTORNEYS—QUALIFICATIONS—ADMISSION—LICENSE AND DISBARMENT

Section 93-2001. Who may be admitted as attorneys.

93-2002. Qualifications, examination, and admission.

93-2014. Compensation and expenses of members of board.

**93-2001. (8936) Who may be admitted as attorneys.** Any citizen or person, resident of this state, who has bona fide declared his or her intention to become a citizen in the manner required by law, of good moral character, and who possesses the necessary qualifications of learning and ability, is entitled to admission as attorney and counselor in all the courts of this state. All persons are attorneys of the supreme court who are entitled to practice in the supreme court when this code takes effect.

**History:** Earlier acts relating to admission and powers of attorneys were Secs. 1-15, pp. 370-373, Bannack Stat.; re-en. Secs. 1-15, pp. 375-378, Cod. Stat. 1871; re-en. Secs. 40-54, 5th Div. Rev. Stat. 1879; re-en. Secs. 102-116, 5th Div. Comp. Stat. 1887.

This section en. Sec. 390, C. Civ. Proc. 1895; re-en. Sec. 6381, Rev. C. 1907; re-en.

Sec. 8936, R. C. M. 1921; amd. Sec. 11, Ch. 168, L. 1971. Cal. C. Civ. Proc. Sec. 275.

### Amendments

The 1971 amendment deleted "of the age of twenty-one years" from the first sentence.

**93-2002. (8937) Qualifications, examination, and admission.** Each applicant for admission as an attorney and counselor must produce satisfactory testimonials of good moral character and a certificate of one or more reputable counselors-at-law that he has been engaged in the study of law for 2 successive years prior to the making of such application and undergo a strict examination as to his qualifications by any one or more of the justices of the supreme court. The form and manner of the examination shall be as the justices may, from time to time, determine. However, a diploma from the university of Montana law school at Missoula or other evidence of having completed the 3-year course in law of that school entitles the holder to a license to practice law in all the courts of this state, subject to the right of the chief justice of the supreme court to order an examination as in ordinary cases of applicants without such diploma or evidence.

**History:** En. Sec. 391, C. Civ. Proc. 1895; re-en. Sec. 6382, Rev. C. 1907; amd. Sec. 1, Ch. 18, L. 1915; re-en. Sec. 8937, R. C. M. 1921; amd. Sec. 35, Ch. 101, L. 1977. Cal. C. Civ. Proc. Sec. 276.

### Compiler's Notes

Chapter 342, Laws 1974, purported to amend this section. However, on June 21, 1974, the Montana Supreme Court held the purported amendment unconstitutional and void. See annotation to In re Senate Bill No. 630, below.

### Amendments

The 1977 amendment substituted references to the university of Montana law school for references to the department of law of the university of Montana; and made minor changes in phraseology, punctuation and style.

### Repealing Clause

Section 36 of Ch. 101, Laws 1977 read "Section 66-1510, 66-1517, 66-1518, 66-1519, 66-1523, 66-1524, 66-2104(1), 66-2120, and 93-2029 through 93-2037, R. C. M. 1947, are repealed."

### Constitutionality

Grant of diploma privilege to graduates of University of Montana law school while requiring graduates of other accredited schools to take bar examination did not constitute an unconstitutional denial of equal protection of laws. *Goetz v. Harrison*, 154 M 274, 462 P 2d 891.

Diploma privilege accorded graduates of University of Montana law school does not violate the equal protection clause of the fourteenth amendment and does not impinge upon fundamental right of interstate travel. *Huffman v. Montana Supreme Court*, 372 F Supp 1175, affirmed 419 US 955, 42 L Ed 2d 172, 95 S Ct 216.

### Diploma Privilege

Familiarity of supreme court justices with University of Montana law school and its faculty and students justifies continuation of practice of admitting graduates without examination. *Goetz v. Harrison*, 154 M 274, 462 P 2d 891.

### Judicial Power

Under paragraph (3), section 2, article VII of the 1972 constitution, the supreme court has exclusive power to make rules governing admission to the bar and the conduct of its members, and the purported amendment of this section by Chapter 342, Laws of 1974, was patently void and in contravention of the principle of separation of powers set forth in section 1, article III of the 1972 constitution. In re Senate Bill No. 630, 164 M 366, 523 P 2d 484; *Matter of McCabe*, — M —, 544 P 2d 825.

### Jurisdiction of District Court

District court had no jurisdiction of an action contesting the validity of this section and seeking restraining order against members of supreme court in their official capacity. *Goetz v. Harrison*, 153 M 403, 457 P 2d 911.

## 93-2005. (8940) Admission of attorneys from other states.

### Applicability to Administrative Proceedings

This section is applicable to administrative proceedings under the supervision

of the supreme court. Application of *American Smelting & Refining Co.*, — M —, 520 P 2d 103.

**93-2014. (8949) Compensation and expenses of members of board.** The members of said board shall be entitled to their travel expenses in attending meetings of said board and in conducting such examination, and also, when away from their homes or places of residence, as provided for in sections 59-538, 59-539, and 59-801, and shall be paid such compensation for services performed by them as members of said board, as may be fixed and determined by the supreme court.

**History:** En. Sec. 6, Ch. 90, L. 1917; re-en. Sec. 8949, R. C. M. 1921; amd. Sec. 82, Ch. 147, L. 1963; amd. Sec. 63, Ch. 439, L. 1975.

sections 59-538, 59-539, and 59-801" for "their necessary lodging and hotel expenses"; and deleted "per diem" before "for services performed."

### Amendments

The 1975 amendment substituted "travel expenses" for "necessary traveling expenses"; substituted "as provided for in

### Repealing Clause

Section 64 of Ch. 439, Laws 1975 read "Section 59-802, R. C. M. 1947, is repealed."

## 93-2023. (8958) Allowance of attorneys' fees, etc.

### Foreign Counsel

The purpose of this section is to prevent the award of attorney's fees to one engaged in the unauthorized practice of law; therefore, foreign counsel who in-

formed his client that he was not licensed to practice in Montana and of the necessity to retain local counsel, and who conducted his case with the permission of the district court, was entitled to recover

fees for services rendered. *Winer v. Jonal Corp.*, — M —, 545 P 2d 1094, overruling *Vaill v. Northern Pacific Ry. Co.*, 66 M 301, 213 P 446.

### 93-2026. (8961) Disbarment of attorneys—causes—jurisdiction.

#### Conviction of Crime

Conviction by a jury in a federal court of the offense of devising and intending to devise a scheme to defraud and to obtain money by means of false and fraudulent pretenses warranted attorney's disbarment. In re Gross, 160 M 506, 503 P 2d 995, certiorari denied in 410 US 991, 93 S Ct 1503.

#### Disbarment

Although the recommendations of the commission are given careful consideration, the recommendation of indefinite suspension was rejected for attorney who admitted to violations involving moral turpitude with no proof of mental disease or defect, and disbarment was ordered. In the Matter of John C. Hall, — M —, 530 P 2d 456.

#### Misappropriation

The conduct of an attorney in opening a checking account in the name of an estate of which he had been appointed executor and making withdrawals for his personal use constituted deceit and malpractice involving moral turpitude. In re O'Donnell, 143 M 51, 387 P 2d 303.

#### Moral Delinquencies in General

Disbarment was justified for attorney who had been previously disciplined by

reprimand and who, after having been charged with debauching young girl, represented her procurer in criminal proceedings, represented both parties in procurer's divorce action, represented girl in quashing affidavit after procurer had married her, and represented another defendant charged with raping the girl. In re Keast, 159 M 311, 497 P 2d 103.

#### Moral Turpitude

Failure of attorney to make return of employees' withholding taxes was offense involving moral turpitude under this section so as to justify indefinite suspension from practice. In re Kline, 156 M 177, 477 P 2d 881.

Even though an act falls short of an offense involving moral turpitude under case law prior to adoption by the supreme court of the canons of professional ethics, it may justify disbarment. Even though an individual act or omission may in and of itself be insufficient grounds for action, repeated violations establishing a pattern of conduct revealing a gross disregard for the highest standards of honesty, justice or morality may and should be grounds for disbarment, suspension, censure or a request for surrender of license to practice law. In re Advisory Opinion to Commission on Practice, 156 M 514, 495 P 2d 1128.

### 93-2029 to 93-2037. (8964 to 8972) Repealed.

#### Repeal

Sections 93-2029 to 93-2037 (Secs. 6411 to 6419, Rev. C. 1907), relating to the

procedure for removing an attorney, were repealed by Sec. 36, Ch. 101, Laws 1977.

## CHAPTER 21—ATTORNEYS—POWERS—DUTIES—LIABILITIES AND COMPENSATION

### 93-2102. (8975) Change of attorney.

#### Death of Client

Attorney was authorized to represent deceased client for whom there was filed a praecipe signed by counsel indicating withdrawal of previous counsel and re-

questing entry of name of new attorney for deceased even though signed and filed by counsel after death of client. State ex rel. Ross v. District Court, Fourth Judicial Dist., 150 M 233, 433 P 2d 778.

### 93-2104. (8977) Death or removal of attorney.

#### Withdrawal of Attorney

Adverse party was not required to advise the opposite party to appoint another lawyer or appear for himself where

the opposite party's lawyer, with the consent of that party, withdrew from the case. *Sikorski & Sons, Inc. v. Sikorski*, — M —, 512 P 2d 1147.



**93-2106. (8979) Punishment for willful delay.****Actual Damages**

Under this section, only actual damages may be trebled, not the statutory interest due. *Daniels v. Paddock*, 145 M 207, 399 P 2d 740.

**Fiduciary Duty**

Where attorney paid off client's mort-

gage with stipulation to receive client's inheritance when it came due, failure to give money to client under transaction, which was a breach of attorney's fiduciary duty, subjected attorney to treble damages. *Daniels v. Paddock*, 145 M 207, 399 P 2d 740.

**93-2112. (8985) Former public prosecutors not to defend, etc.****DECISIONS UNDER FORMER LAW****New Trial**

Under a repealed section prohibiting attorneys from defending prosecutions carried on formerly by themselves, convicted petitioner was not entitled to new trial merely on ground his voluntarily hired counsel had prosecuted him four years before, where petitioner at all times knew that his counsel was such former prosecutor, and where the trial at hand had no relation to any official duty performed by his counsel as prosecutor. In re *Petition of Allen*, — M —, 507 P 2d 1049.

**Separate Charges**

Appointment, as defense counsel, of attorney who had successfully prosecuted

defendant on another charge over seven years earlier was not a violation of defendant's constitutional rights; prosecution of an individual by a former county attorney did not forever prohibit that attorney from defending that individual on a separate and distinct criminal charge. *Petition of Pepperling*, — M —, 508 P 2d 569.

**Waiver**

Defendant who had choice of defense counsel and chose attorney who had prosecuted him in earlier case, waived any right to demand new trial based on such representation. *State v. Gallagher*, — M —, 509 P 2d 852.

**93-2120. (8993) Lien for compensation.****Obligations of Third Parties**

Fact that settlement of personal injury claim by attorneys for their client incidentally benefited hospital by creating fund from which its bill for treatment of client could be paid did not create an implied contract by hospital to pay attorneys for their services; neither was hospital obligated to share settlement proceeds on a subrogation theory. *Sisters of Charity of Providence of Montana v. Nichols*, 157 M 106, 483 P 2d 279.

**Priority of Liens**

Where settlement in personal injury case was paid in three drafts, lien of attorneys representing injured party attached to all three drafts; since amount of drafts was sufficient to satisfy attorneys' fees in full, previously subordinate hospital lien became the senior outstanding lien against the balance of the settlement proceeds notwithstanding that attorneys did not actually collect their fees; attorneys and injured party could not require payment of a prorata share of attorneys' fees from that portion of

settlement proceeds otherwise payable to hospital under its lien rights. *Sisters of Charity of Providence of Montana v. Nichols*, 157 M 106, 483 P 2d 279.

**Unemployment Compensation Cases**

This section being in conflict with sections 87-142 and 87-143, relating to unemployment compensation claims, the latter sections, being more specific, should control over this section, which is more general, especially where, in light of the services rendered, the attorney's fees could be considered "necessaries" under section 87-143. *McAlear v. Unemployment Compensation Commission*, 145 M 458, 405 P 2d 219.

**Waiver of Lien**

Failure of attorney to deduct expenses incurred in obtaining award in case and his expressed intention that he would collect expenses from future settlements constituted waiver of his lien for expenses. *Gross v. Holzworth*, 151 M 179, 440 P 2d 765.

## CHAPTER 25—LIMITATION OF ACTIONS FOR RECOVERY OF REAL PROPERTY

Section 93-2504. Seizin within five years—when necessary in actions for real property.

**93-2504. (9015) Seizin within five years—when necessary in actions for real property.** No action for the recovery of real property, or for the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the property in question within five years before the commencement of the action.

**History:** Ap. p. Sec. 29, p. 45, L. 1877; re-en. Sec. 29, 1st Div. Rev. Stat. 1879; re-en. Sec. 29, 1st Div. Comp. Stat. 1887; amd. Sec. 483, C. Civ. Proc. 1895; re-en. Sec. 6432, Rev. C. 1907; re-en. Sec. 9015, R. C. M. 1921; amd. Sec. 1, Ch. 224, L. 1953; amd. Sec. 12, Ch. 263, L. 1975. Cal. C. Civ. Proc. Sec. 318.

### Amendments

The 1975 amendment deleted a second sentence relating to action for recovery of dower. For prior text, see parent volume.

### Public Highway

Public highway was established by prescription on evidence that members of public had used road openly for more than fifty years without ever having obtained permission from owners, that previous owner had considered road a public highway, that road had been maintained by county for some 24 years and that public had never been denied use of road. *Kostbade v. Metier*, 150 M 139, 432 P 2d 382.

**93-2507. (9018) Possession—when presumed, etc.**

### Public Highway

Where county adversely paved and maintained a highway over the land of a private party for a period of more than ten years, such county acquired an easement by prescription over the land even though the private owner was assessed for and paid taxes on the property during the running of the statutory period. *Brannon v. Lewis and Clark County*, 143 M 200, 387 P 2d 706.

### Use for Less than Statutory Period

Adverse use for less than full statutory period of five years confers no right or interest upon the adverse user, so that there was no consideration for an alleged contract granting an easement over another route. *Larson v. Burnett*, 158 M 421, 492 P 2d 921.

**93-2508. (9019) Occupation under written instrument or judgment, etc.**

### Possession under Color of Title

Rancher, who received administrator's deed purporting to convey land, which deed was reviewed by two attorneys who failed to note the discrepancy in the deed and which deed also misled the right-of-way department for a power company which paid the rancher \$800 for an underground pipeline easement across the tract, occupied the land under claim or color of title within meaning of this section. *Brown v. Cartwright*, — M —, 515 P 2d 684.

### Tolling of Statute

Statute of limitations did not toll during period when Indian plaintiff was attempting to persuade the United States to bring action against vendee of Indian's land on grounds that sale was fraudulent. *Dillon v. Antler Land Co.*, 341 F Supp 734, affirmed 507 F 2d 940, certiorari denied, 421 US 992, — L Ed 2d —, 95 S Ct 1998.

### References

*Rhodes v. Weigand*, 145 M 542, 402 P 2d 588.

**93-2509. (9020) What constitutes adverse possession, etc.**

### Possession under Color of Title

Certificate of assignment given to person paying delinquent taxes on realty did not give that person color of title and

did not bring him within ambit of this section. *Magelssen v. Atwell*, 152 M 409, 451 P 2d 103.

**93-2511. (9022) What constitutes adverse possession, etc.****Conflicting Evidence**

Finding of district court that adverse possession was not established was affirmed, in light of record disclosing conflicting testimony on question of existence and upkeep of fences and conflicting testimony on question whether and who ran livestock on property during the prescriptive period. *Johnson v. Silver Bow County*, 151 M 283, 443 P 2d 6.

**Necessary Intent**

No adverse possession was established where plaintiff did not, by any of actions, show requisite intent to possess adversely, particularly in view of letter in which plaintiff admitted that defendants owned the disputed land. *Magelssen v. Atwell*, 152 M 409, 451 P 2d 103.

**93-2513. (9024) Occupancy and payment of taxes necessary, etc.****Burden of Proof**

The burden of proving all the essential elements of adverse possession is upon the party alleging it and he must prove that no taxes were levied or assessed against the land or that he has paid all taxes which were levied thereon. *Townsend v. Koukol*, 148 M 1, 416 P 2d 532, 532, 535, 536.

**Easement**

Where the county maintained and paved a highway over the land of a private party for a period of more than ten years, such county acquired an easement by prescription over the land and it was not necessary that the county pay taxes on the property during the statutory period. *Brannon v. Lewis and Clark County*, 143 M 200, 387 P 2d 706.

**Essential Elements**

To constitute adverse possession, the possession must be actual, feasible, exclusive, hostile and continuous for the full period of years and the party asserting adverse possession must have paid all the taxes levied and assessed upon the property during the statutory period. *Townsend v. Koukol*, 148 M 1, 416 P 2d 532, 535, 536.

**Payment of Taxes**

Since filing of a quiet title action freezes the respective rights of the parties at the time of the commencement of the action, party who sought to quiet title to land in himself was unable to establish his right to title by paying back taxes on land after commencement of the

action where the adverse possessor had, prior to commencement of the action, occupied and claimed the land for a period of five years continuously and had paid all taxes assessed upon the land during that period. *Brown v. Cartwright*, — M —, 515 P 2d 684.

**Sufficiency of Possession**

In quiet title action, plaintiff's knowledge of adverse claimant's acceptance of consideration from power company for the granting of an easement, plaintiff's lack of dispute of ownership upon adverse claimant's offer to sell him the tract involved, adverse claimant's continued use of the tract, his employment of a surveyor and erection of a fence on the premises and plaintiff's allowing adverse claimant to pay taxes on the tract for five years, sufficiently established adverse claimant's possession during statutory period. *Brown v. Cartwright*, — M —, 515 P 2d 684.

**Taxes as Lease Payment**

Where plaintiff's antecedent occupied property in question continuously for at least 15 years, enclosed and cultivated land and paid all property taxes, this did not establish adverse possession where defendants were successors of titleholders and payment of taxes was held to be agreed lease payment for use of land. *Horacek v. Hudson*, — M —, 538 P 2d 1019.

**References**

*Rhodes v. Weigand*, 145 M 542, 402 P 2d 588.

**CHAPTER 26—LIMITATION OF OTHER ACTIONS**

- Section 93-2604.** Within five years.  
**93-2607.** Two-year limitation.  
**93-2612.** Actions relating to bond issues, time for bringing.  
**93-2619.** Action for damages arising out of or resulting from construction of improvements to real property—ten years.  
**93-2620.** Exception—injury occurring during tenth year.  
**93-2621.** Responsibility of person in control not affected.  
**93-2622.** Time of completion of improvements to real property.



- 93-2623. Other limitation periods not extended.  
 93-2624. Actions for medical malpractice.  
 93-2625. Actions for legal malpractice.

### 93-2603. (9029) Within eight years.

#### Nonparticipating Oil Royalty

Where wife agreed to property settlement granting her a percentage of royalties should oil ever be found on land, such right did not vest until oil production

began and her action for royalties was not barred by the fact that it had been more than eight years since execution of the settlement. *Close v. Ruegsegger's Estate*, 143 M 32, 386 P 2d 739.

### 93-2604. (9030) Within five years. Within five years:

1. An action upon a contract, account, promise, not founded on an instrument in writing.
2. An action upon a judgment or decree rendered in a court not of record. The cause of action is deemed, in such case, to have accrued when final judgment was rendered.

History: En. Sec. 513, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 157, L. 1901; amd. Sec. 1, Ch. 128, L. 1903; re-en. Sec. 6446, Rev. C. 1907; re-en. Sec. 9030, R. C. M. 1921; amd. Sec. 13, Ch. 263, L. 1975. Cal. C. Civ. Proc. Sec. 339.

#### Amendments

The 1975 amendment deleted former subdivision 2; and redesignated former subdivision 3 as subdivision 2. For prior version, see parent volume.

#### Damage to Building from Broken Water Pipes

This section did not apply to action by owners of apartment building against realtors for water damages to building from bursting of water pipes due to alleged negligence of realtors in caring for the building. The claim was barred by statute of limitations relating to injury to or waste or trespass on property, section 93-2607. *Quitmeyer v. Theroux*, 144 M

302, 395 P 2d 965, 969, 970. (Dissenting opinion, 144 M 302, 395 P 2d 965, 971.)

#### Decedents' Estates

Five-year-limitation period under this section did not include time between decedent's death and issuance of letters of administration to defendant. *Cartwright v. Joyce*, 155 M 478, 473 P 2d 515.

#### Partial Bar by Statute

Fact that plaintiff had been awarded full judgment for services rendered without regard to limitation period under this section did not require that entire verdict be set aside but only that the judgment be reduced by value of services rendered prior to five year period, since the claim was divisible. *Cartwright v. Joyce*, 155 M 478, 473 P 2d 515.

#### References

*Hager v. Tandy*, 146 M 531, 410 P 2d 447.

### 93-2605. (9031) Within three years.

#### Absence from State

Absence of alleged tort-feasor from state did not toll statute of limitations where it was possible to obtain service during the entire three-year period, under Rule 4D(2)(a) initially and under Rule 4D(3) after he left the state. *State ex rel. McGhee v. District Court, Sixteenth Judicial Dist., Fallon County*, — M —, 508 P 2d 130.

#### Amendment of Complaint

Three-year limitation for tort actions did not preclude amendment of complaint to correct misnomer by which defendant was referred to erroneously as Illinois corporation rather than as Delaware corporation; federal rule was applied in al-

lowing the amendment. *Wentz v. Alberto Culver Co.*, 294 F Supp 1327.

#### Exhaustion of Administrative Remedies

Cause of action on statutory bond did not accrue until required administrative proceedings were complete and board had made final determination of amount due. *Montana Milk Control Board v. Hartford Accident & Indemnity Co.*, 153 M 299, 456 P 2d 302.

#### Fraudulent Concealment

Doctrine of fraudulent concealment was not applicable to medical malpractice case in which plaintiff alleged that doctor had failed to make a full disclosure of the experimental nature of the operation to

be performed but admitted that he was informed in detail of the type of operation to be performed and that he consented to the operation and where, although doctor assured the plaintiff that he would be able to return to work within six months of the operation, plaintiff admitted to being totally disabled for six years after the operation and permanently partially disabled thereafter. *Monroe v. Harper*, — M —, 518 P 2d 788.

### "Liability Created by Statute"

Action against county by motorist who alleged he suffered personal injuries in a single vehicle accident due to negligent failure of county to properly maintain and mark a "T" intersection of county roads was subject to three-year statute of limitations under this section, rather than the two-year statute of limitations under 93-2607(1) as an action "upon a liability created by statute," since section 40-4402 waiving sovereign immunity to extent of county's liability insurance simply removes a defense previously available rather than creating a new cause of action. *State ex rel. Fallon County v. District Court, Sixteenth Judicial Dist., Fallon County*, 161 M 79, 505 P 2d 120.

### Malpractice

Where sponge had been left in patient's body in operation performed ten years previously, patient's cause of action for malpractice did not accrue until patient learned that such foreign object was in his body. *Johnson v. St. Patrick's Hospital*, 148 M 125, 417 P 2d 469, 473, distinguished in — M —, 518 P 2d 788.

### Product Liability

Where plaintiff developed cataracts following use of defendant's drug, there was question of fact as to whether publicity connecting the drug and cataracts was sufficient to put plaintiff on notice as to cause of his cataracts, thus to start the statute running, and motion for summary judgment for defendant, based on statute of limitations, was denied. *Hornung v. Richardson-Merrill, Inc.*, 317 F Supp 183.

### Wrongful Death

This section, rather than section 93-2607, applies to an action from wrongful death. *Bryant v. Hall*, 157 M 28, 482 P 2d 147, overruling *Smith v. Wiprud*, 154 M 325, 463 P 2d 317.

### References

*Rhodes v. Weigand*, 145 M 542, 402 P 2d 588.

## 93-2607. (9033) Two-year limitation. Within two years:

1. An action upon a liability created by statute other than a penalty or forfeiture.

2. An action for injury to or for waste or trespass on real or personal property; provided that, when the waste, trespass or injury is committed by reason of underground work upon any mining claim or seismic exploration, location, spacing, drilling, equipping, producing, or other operation related to exploration or production of oil, gas, water, geothermal, or other minerals, the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting such waste, trespass, or injury.

3 to 5. \* \* \* [Same as parent volume.]

**History:** En. Sec. 1, p. 50, L. 1893; re-en. Sec. 524, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 128, L. 1903; re-en. Sec. 6449, Rev. C. 1907; amd. Sec. 1, Ch. 47, L. 1917; amd. Sec. 1, Ch. 172, L. 1921; re-en. Sec. 9033, R. C. M. 1921; amd. Sec. 1, Ch. 423, L. 1975. Cal. C. Civ. Proc. Sec. 338.

### Amendments

The 1975 amendment inserted "or injury" after "trespass" throughout subdivision 2; inserted "or seismic exploration, location, spacing, drilling, equipping, producing, or other operation relating to exploration or production of oil, gas, water, geothermal, or other minerals" in

subdivision 2; and made minor changes in punctuation.

### Claim and Delivery

In an action for claim and delivery, where possession by the defendant is rightful, the statute of limitations begins to run when the defendant refuses upon demand to return the property. *Interstate Mfg. Co. v. Interstate Products Co.*, 146 M 449, 408 P 2d 478.

### Damage by Fire

Two-year statute of limitations under this section barred suit brought by the United States under section 82-1237 for

damage to property caused by alleged negligence of defendants in setting forest fire. *United States v. Eytcheson*, 237 F Supp 371.

### **Damage to Building from Broken Water Pipes**

Claim of owners of an apartment building against realtors for water damage to building from bursting of water pipes due to alleged negligence of realtors in caring for the building was barred by this section. Statute of limitations concerning implied contracts, section 93-2604, was inapplicable. *Quitmeyer v. Theroux*, 144 M 302, 395 P 2d 965, 969, 970. (Dissenting opinion, 144 M 302, 395 P 2d 965, 971.)

### **Fraud and Mistake**

An action by administrator of estate of deceased against surviving partners to recover assets which had been transferred by deceased during his last illness was timely filed on July 25, 1960 where fraud was not discovered until December 1, 1958. *Marshall v. Minlschmidt*, 148 M 263, 419 P 2d 486, 491.

Action to rescind contract for sale of real estate was barred when not brought within two years after discovery of fraud by all parties concerned. *Rock v. Birdwell*, 149 M 449, 429 P 2d 634.

Quiet title action based on husband's fraud of wife's community property and instituted within two years of discovery of facts constituting fraud was timely even though brought as counterclaim. *Rozan v. Rosen*, 150 M 121, 431 P 2d 870.

Trial court properly granted defendant's motion for summary judgment in action for fraudulent representation, or in alternative breach of contract, in sale of tractor since plaintiff's having failed to state claim in complaint for breach of contract made tort statute applicable and tort action was barred by this section. *Israelson v. Mountain Tractor Co.*, 155 M 69, 467 P 2d 149.

Where plaintiff developed cataracts following use of defendant's drug, evidence that wide publicity had been given to causal relationship between drug and cataracts did not establish that plaintiff was charged with knowledge of such relationship so as to constitute discovery under subsection 4 of this section. *Hornung v. Richardson-Merrill, Inc.*, 317 F Supp 183.

### **Injury to Personal Property**

An action by an adoptive father and natural grandfather under section 93-2809 is an action for an injury to a pecuniary interest of the parent, therefore one for an injury to a property right which must be

commenced within two years from the date the claim arose under subdivision 2 of this section. *LaTray v. Mannix Electric Co.*, 148 M 303, 419 P 2d 744, 745; but see *Bryant v. Hall*, 157 M 28, 482 P 2d 147.

### **Injury to Real Property**

Where defendant's geophysical exploration injured plaintiff's real property, statute of limitations under subdivision 2 of this section was not tolled by plaintiff's decision to permit defendant to repair the damage with approximately one year remaining under the statute. *Carlson v. Ray Geophysical Division*, 156 M 450, 481 P 2d 327.

### **"Liability Created by Statute"**

Action against county by motorist who alleged he suffered personal injuries in a single vehicle accident due to negligent failure of county to properly maintain and mark a "T" intersection of county roads was subject to three-year statute of limitations under section 93-2605, rather than two-year statute of limitations under subdivision (1) of this section as an action "upon a liability created by statute," since section 40-4402 waiving sovereign immunity to extent of county's liability insurance simply removes a defense previously existing rather than creating a new cause of action. *State ex rel. Fallon County v. District Court, Sixteenth Judicial Dist., Fallon County*, 161 M 79, 505 P 2d 120.

### **Negligent Misrepresentation**

Action for negligent misrepresentation is action for fraud within meaning of statute and is subject to two-year statute of limitations which begins to run when plaintiff acquires knowledge of facts constituting negligent misrepresentation. *Falls Sand & Gravel Co. v. Western Concrete, Inc.*, 270 F Supp 495.

### **Nuisance**

In action for alleged well pollution, trial court erred in not limiting recovery to two years before filing date of complaint since, under circumstances, pollution of ground water by dumping of glue waste was continuing temporary nuisance and this section applied. *Nelson v. C & C Plywood Corp.*, 154 M 414, 465 P 2d 314, 39 ALR 3d 893.

Two year statute of limitation was applicable to continuous and unremitting nuisance; recovery for damage occurring as a result of continuous and unremitting nuisance more than two years prior to the commencement of an action was barred by this section. *Lahman v. Rocky Mountain Phosphate Co.*, 161 M 28, 504 P 2d 271.



**Statutory Liability**

The cause of action based on a railroad's statutory duty to maintain a cement drop, siphon and wooden flume on its right of way did not accrue on the taking of the right of way nor on the abandonment of the right of way and notice to water rights owners that it would no longer maintain the works, but rather would accrue only after injury occurred from the railroad's failure to maintain the works. *Harrer v. Northern Pacific Ry. Co.*, 147 M 130, 410 P 2d 713.

Cause of action under federal civil rights statute for improper search accrued at the time of the search, not at the time the search was adjudicated invalid or when criminal prosecution was terminated, so that action brought more than two years after the search was barred by this section. *Strung v. Anderson*, 452 F 2d 632.

**Waiver**

Although plaintiff filed complaint alleging injury to real property more than two years after injury occurred, defendants waived defense of statute of limitations when they failed to plead it affirmatively. *Butte Country Club v. Metropolitan Sanitary & Storm Sewer Dist. No. 1*, — M —, 519 P 2d 408.

**Wrongful Death**

Section 93-2605, rather than subdivision 2 of this section, applies to an action for wrongful death. *Bryant v. Hall*, 157 M 28, 482 P 2d 147, overruling *Smith v. Wiprud*, 154 M 325, 463 P 2d 317.

**References**

*Rhodes v. Weigand*, 145 M 542, 402 P 2d 588; *Hager v. Tandy*, 146 M 531, 410 P 2d 447.

**93-2612. (9040) Actions relating to bond issues, time for bringing.** No action can be brought for the purpose of restraining the issuance and sale of bonds or other obligations by the state of Montana or any school district, county, city, town, or political subdivision of the state, or for the purpose of restraining the levy and collection of taxes for the payment of such bonds or other obligations, after the expiration of sixty (60) days from the date of the election on such bonds or obligations or, if no election was held thereon, after the expiration of sixty (60) days from the date of the order, resolution or ordinance authorizing the issuance thereof, on account of any defect, irregularity, or informality in giving notice of or not holding the election; nor shall any defense based upon any such defect, irregularity, or informality be interposed in any action unless brought within this period. This section applies but is not limited to any action and defense in which the issue is raised whether a voted debt or liability has carried by the required majority vote of the electors qualified and offering to vote thereon.

**History:** En. Sec. 1, Ch. 114, L. 1919; re-en. Sec. 9040, R. C. M. 1921; amd. Sec. 15, Ch. 158, L. 1971.

**Amendments**

The 1971 amendment completely rewrote this section. For prior text, see parent volume.

**93-2613. (9041) Actions for relief not hereinbefore provided for.**

**References**

*Rhodes v. Weigand*, 145 M 542, 402 P 2d 588.

**93-2619. Action for damages arising out of or resulting from construction of improvements to real property—ten years.** Except as provided in sections 2 and 3 [93-2620 and 93-2621] of this act, no action to recover damages (other than an action upon any contract, obligation, or liability, founded upon an instrument in writing) resulting from or arising out of the design, planning, supervision, inspection, construction, or observation of construction of, or land surveying done in connection with,

any improvement to real property shall be commenced more than ten (10) years after completion of such improvement.

**History:** En. Sec. 1, Ch. 60, L. 1971.

#### **Title of Act**

An act to provide a period of ten years within which an action for damages arising out of certain services or work on improvements to real property must be commenced; and providing an effective date.

#### **Constitutionality**

This section was not unconstitutional under Article II, § 16 of the 1972 state constitution because it denied a remedy for a legal wrong, nor under Article V, § 11 because it embraced more than a

single subject clearly expressed in its title; nor did it violate the due process and/or equal protection clauses of the fourteenth amendment. *Reeves v. Ille Electric Co.*, — M —, 551 P 2d 647.

#### **Injuries from Unsafe Structure**

A contractor following plans and specifications given to him, although not ordinarily liable for injuries resulting from a fault in the design of the structure, may be liable if a contractor of average skill and ordinary prudence would not have followed those specifications. *Bush v. Albert D. Wardell Contractor, Inc.*, — M —, 528 P 2d 215.

**93-2620. Exception—injury occurring during tenth year.** Notwithstanding the provisions of section 1 [93-2619] of this act, an action for such damages for an injury which occurred during the tenth year after such completion may be commenced within one (1) year after the occurrence of such injury.

**History:** En. Sec. 2, Ch. 60, L. 1971.

**93-2621. Responsibility of person in control not affected.** The limitation prescribed by this act shall not affect the responsibility of any owner, tenant, or person in actual possession and control of the improvement at the time a right of action arises.

**History:** En. Sec. 3, Ch. 60, L. 1971.

**93-2622. Time of completion of improvements to real property.** As used in this act, the term "completion" means that degree of completion at which the owner can utilize the improvement for the purpose for which it was intended or when a completion certificate is executed, whichever is earlier.

**History:** En. Sec. 4, Ch. 60, L. 1971.

**93-2623. Other limitation periods not extended.** Nothing in this act shall be construed as extending the period prescribed by the laws of this state for the bringing of any action.

**History:** En. Sec. 5, Ch. 60, L. 1971.

#### **Effective Date**

Section 6 of Ch. 60, Laws 1971 read "In order to provide a reasonable period for

commencement of any action for which a right of action has heretofore accrued, this act shall be effective January 1, 1972."

**93-2624. Actions for medical malpractice.** Action for injury or death against a physician or surgeon, dentist, registered nurse, nursing home administrator, dispensing optician, optometrist, licensed physical therapist, podiatrist, psychologist, osteopath, chiropractor, clinical laboratory bioanalyst, clinical laboratory technologist, pharmacist, veterinarian, a li-

censed hospital or long-term care facility as the employer of any such person, based upon such person's alleged professional negligence, or for rendering professional services without consent, or for error or omission in such person's practice, shall be commenced within three (3) years after the date of injury or three (3) years after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury whichever occurs last, but in no case may such action be commenced after five (5) years from the date of injury. However, this time limitation shall be tolled for any period during which such person has failed to disclose any act, error, or omission upon which such action is based and which is known to him, or through the use of reasonable diligence subsequent to said act, error or omission would have been known to him.

**History:** En. Sec. 1, Ch. 328, L. 1971; amd. Sec. 1, Ch. 191, L. 1973.

#### **Title of Act**

An act to prescribe the period of limitations in which actions for professional negligence can be commenced.

#### **Amendments**

The 1973 amendment inserted "nursing home administrator" and "long-term care facility" in the first sentence.

#### **Applicability**

This statute has prospective application only; it could not be applied where the alleged negligence giving rise to the action occurred prior to its effective date, even though the action was brought after that date. *Penrod v. Hoskinson*, — M —, 552 P 2d 325.

#### **Fraudulent Concealment**

Doctrine of fraudulent concealment was not applicable to medical malpractice case in which plaintiff alleged that doctor had failed to make a full disclosure of the experimental nature of the operation to be performed but admitted that he was informed in detail of the type of operation to be performed and that he consented to the operation and where, although doctor assured plaintiff that he would be able to return to work within six months of the operation, plaintiff admitted to being totally disabled for six years after the operation and partially disabled thereafter. *Monroe v. Harper*, — M —, 518 P 2d 788.

**93-2625. Actions for legal malpractice.** An action against an attorney licensed to practice law in Montana, or a paralegal assistant or a legal intern employed by an attorney, based upon the person's alleged professional negligent act or for error or omission in the person's practice must be commenced within 3 years after the plaintiff discovers, or through the use of reasonable diligence should have discovered the act, error, or omission, whichever occurs last, but in no case may the action be commenced after 10 years from the date of the act, error, or omission.

**History:** En. 93-2625 by Sec. 1, Ch. 220, L. 1977.

#### **Title of Act**

An act to provide for a statute of limitations for legal malpractice actions and to clarify the effect of disabilities on statutes of limitations; amending section 93-2703, R. C. M. 1947.

tations for legal malpractice actions and to clarify the effect of disabilities on statutes of limitations; amending section 93-2703, R. C. M. 1947.

## **CHAPTER 27—TIME OF COMMENCEMENT OF ACTIONS— GENERAL PROVISIONS CONCERNING**

- Section 93-2703. Exception as to persons under disabilities.  
 93-2721. Claim not to be stated.  
 93-2722. Request for statement of claim.  
 93-2723. Claim made in certain circumstances.  
 93-2724. Permissive delivery of statement.



**93-2702. (9048) Exception, where defendant is out of the state.****Service Possible**

Absence of alleged tort-feasor from statute did not toll statute of limitations where it was possible to obtain service during the entire three-year period, under

Rule 4D(2)(a) initially and under Rule 4D(3) after he left the state. *State ex rel. McGhee v. District Court, Sixteenth Judicial Dist., Fallon County, — M —, 508 P 2d 130.*

**93-2703. (9049) Exception as to persons under disabilities.** If a person entitled to bring an action, mentioned in Title 93, chapter 26, be, at the time the cause of action accrued, either:

1. Within the age of majority; or,
2. Insane; or,
3. Imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than for life;

the time of such disability is not a part of the time limited in sections 93-2401 to 93-2720 for commencing the action; except that the time so limited cannot be extended more than five years by any such disability, except infancy; or, in any case, more than one year after the disability ceases.

**History:** Ap. p. Sec. 14, p. 468, *Bannack Stat.*; re-en. Sec. 12, p. 517, *Cod. Stat. 1871*; repealed Sec. 674, p. 215, *L. 1877*; re-en. Sec. 542, *C. Civ. Proc. 1895*; re-en. Sec. 6459, *Rev. C. 1907*; re-en. Sec. 9049, *R. C. M. 1921*; amd. Sec. 2, *Ch. 220, L. 1977. Cal. C. Civ. Proc. Sec. 352.*

**Amendments**

The 1977 amendment substituted "Title 93, chapter 26" for "sections 93-2601 to 93-2609 or sections 93-2613 to 93-2618" near the beginning of the section.

**Insanity Tolling Statute**

Where plaintiff was insane for approximately five months following personal injuries, statute did not begin to run until he recovered his sanity and action was timely filed when commenced within statutory period after that date. *State ex rel. Hi-Ball Contractors, Inc. v. District Court, 154 M 99, 460 P 2d 751.*

**93-2708. (9054) Provision where judgment has been reversed.****Dismissal of Counterclaim**

Quiet title action based on husband's fraud of wife's community property instituted as counterclaim and timely brought under statute of limitations but dismissed on husband's motion may be properly instituted as principal action within one year after involuntary dismissal. *Rozan v. Rosen, 150 M 121, 431 P 2d 870.*

**Failure to Amend Complaint**

Filing of new action was barred, where plaintiff had brought diversity action in New York within the proper time limit, but the cause had been dismissed for failure to amend complaint, which under Montana law, would have constituted

either a voluntary dismissal or a dismissal for failure to prosecute. *Lehtonen v. E. I. DuPont DeNemours & Co., 389 F Supp 633.*

**Neglect to Prosecute**

Dismissal under M. R. Civ. P., Rule 41 (e), for failure to have summons issued within one year after commencement of the action is a dismissal for neglect to prosecute within the meaning of this section, and this section does not operate to permit the commencement of a new action after expiration of the statute of limitations. *State ex rel. Equity Supply Co. v. District Court, 159 M 34, 494 P 2d 911.*

**93-2721. Claim not to be stated.** In an action for the recovery of money or damages for personal injury or wrongful death, the amount thereof may not be stated in the claim for relief, whether an original claim, counterclaim, cross-claim, or third party claim.

**History:** En. 93-2721 by Sec. 1, *Ch. 525, L. 1977.*

**Title of Act**

An act concerning the pleading of damages in actions for personal injury or wrongful death.

**93-2722. Request for statement of claim.** When an action is filed in the district court to recover damages for personal injury or wrongful death, the parties against whom the action is brought may at any time request a statement setting forth the nature and amount of damages being sought. The request shall be filed and served upon the claimant, who shall file and serve a responsive statement as to damages within 15 days thereafter. In the event that a response is not served, the party on notice to the claimant who may petition the court in which the action is pending to order the claimant to serve a responsive statement.

**History:** En. 93-2722 by Sec. 2, Ch. 525, L. 1977.

**93-2723. Claim made in certain circumstances.** If no request is made for such a statement setting forth the nature and amount of damages being sought, the claimant shall give notice to the defendant of the amount of special and general damages sought to be recovered:

- (1) before a default may be taken; or
- (2) in the event an answer is filed, at least 45 days prior to the date set for the trial.

**History:** En. 93-2723 by Sec. 3, Ch. 525, L. 1977.

**93-2724. Permissive delivery of statement.** A copy of the statement setting forth the nature and amount of damages being sought may be delivered to the defendant at the time of service of the summons and complaint but may not be filed for 20 days after the complaint is filed.

**History:** En. 93-2724 by Sec. 4, Ch. 525, L. 1977.

## CHAPTER 28—PARTIES TO CIVIL ACTIONS

- Section 93-2803.** When a married person is a party—actions by and against.  
**93-2804.** Spouse may defend, when.  
**93-2807.** Unmarried person may sue for seduction.  
**93-2808.** Parent or guardian may sue for seduction of child or ward.  
**93-2809.** Parent or guardian may sue for injury or death of child or ward.  
**93-2815.** Joinder of state as defendant in certain actions.  
**93-2830.** Who may be sued on overdue negotiable instruments—transfer.

**93-2803. (9069) When a married person is a party—actions by and against.** A married person may sue and be sued in the same manner as if such person were sole.

**History:** En. Sec. 7, 1st Div. Comp. Stat. 1887; re-en. Sec. 572, C. Civ. Proc. 1895; re-en. Sec. 6479, Rev. C. 1907; re-en. Sec. 9069, R. C. M. 1921; amd. Sec. 48, Ch. 535, L. 1975.

### Amendments

The 1975 amendment substituted “married person” for “married woman” and made a minor change in phraseology.

**93-2804. (9070) Spouse may defend, when.** If a husband and wife be sued together, each spouse may defend for his or her own right, and if the other spouse neglect to defend, the spouse who does choose to defend may defend for the other spouse’s right also.

History: En. Sec. 8, p. 44, Bannack Stat.; re-en. Sec. 8, p. 136, L. 1867; re-en. Sec. 8, p. 28, Cod. Stat. 1871; amd. Sec. 8, p. 41, L. 1877; re-en. Sec. 8, 1st Div. Rev. Stat. 1879; re-en. Sec. 8, 1st Div. Comp. Stat. 1887; re-en. Sec. 573, C. Civ. Proc. 1895; re-en. Sec. 6480, Rev. C. 1907; re-en. Sec. 9070, R. C. M. 1921; amd.

Sec. 49, Ch. 535, L. 1975. Cal. C. Civ. Proc. Sec. 371.

#### Amendments

The 1975 amendment substituted "spouse" for references to the husband or the wife; and made minor changes in phraseology.

**93-2807. (9073) Unmarried person may sue for seduction.** An unmarried person may prosecute, as plaintiff, an action for his or her own seduction, and may recover therein such damages, pecuniary or exemplary, as are assessed in such person's favor.

History: En. Sec. 11, p. 41, L. 1877; re-en. Sec. 11, 1st Div. Rev. Stat. 1879; re-en. Sec. 11, 1st Div. Comp. Stat. 1887; re-en. Sec. 576, C. Civ. Proc. 1895; re-en. Sec. 6483, Rev. C. 1907; re-en. Sec. 9073, R. C. M. 1921; amd. Sec. 50, Ch. 535, L. 1975. Cal. C. Civ. Proc. Sec. 374.

#### Amendments

The 1975 amendment substituted "unmarried person" for "unmarried female"; and made minor changes in phraseology.

**93-2808. (9074) Parent or guardian may sue for seduction of child or ward.** Either parent may prosecute as plaintiff for the seduction of the child, and the guardian for the seduction of the ward, though the child or ward be not living with or in the service of the plaintiff at the time of the seduction or afterwards, and there be no loss of service.

History: En. Sec. 12, p. 41, L. 1877; re-en. Sec. 12, 1st Div. Rev. Stat. 1879; re-en. Sec. 12, 1st Div. Comp. Stat. 1887; re-en. Sec. 577, C. Civ. Proc. 1895; re-en. Sec. 6484, Rev. C. 1907; re-en. Sec. 9074, R. C. M. 1921; amd. Sec. 51, Ch. 535, L. 1975. Cal. C. Civ. Proc. Sec. 375.

#### Amendments

The 1975 amendment substituted "Either parent" for "A father, or in case of his death or desertion of his family, the mother"; and substituted "child" for "daughter" in two places.

**93-2809. (9075) Parent or guardian may sue for injury or death of child or ward.** Either parent may maintain an action for the injury or death of a minor child, and a guardian for injury or death of a ward, when such injury or death is caused by the wrongful act or neglect of another. Such action may be maintained against the person causing the injury or death, or if such person be employed by another person who is responsible for his conduct, also against such other person.

History: En. Sec. 11, p. 44, Bannack Stat.; amd. Sec. 11, p. 136, L. 1867; re-en. Sec. 11, p. 29, Cod. Stat. 1871; re-en. Sec. 13, p. 42, L. 1877; re-en. Sec. 13, 1st Div. Rev. Stat. 1879; re-en. Sec. 13, 1st Div. Comp. Stat. 1887; amd. Sec. 578, C. Civ. Proc. 1895; re-en. Sec. 6485, Rev. C. 1907; re-en. Sec. 9075, R. C. M. 1921; amd. Sec. 52, Ch. 535, L. 1975. Cal. C. Civ. Proc. Sec. 376.

#### Amendments

The 1975 amendment substituted "Either parent" for "A father, or in case of his death or desertion of his family, the mother"; and made a minor change in phraseology.

#### Interfamily Tort Immunity Doctrine

Where wife could not have maintained tort action against husband for injuries received in automobile accident allegedly due to husband's negligence, there was no cause of action to flow to her personal representative, and son could not maintain action as her personal representative after her death. *State Farm Mutual Automobile Ins. Co. v. Leary*, — M —, 544 P 2d 444.

#### Jurisdiction—Indian plaintiff

Montana has jurisdiction to hear action for wrongful death brought by Indian plaintiff against non-Indian as a result of automobile accident within the boundaries of the reservation, since all persons



have free access to Montana courts and equal protection of its laws. *McCrea v. Busch*, — M —, 524 P 2d 781.

#### Limitation of Actions

An action by an adoptive father and natural grandfather under this section is an action for an injury to a pecuniary interest of the parent, therefore one for an injury to a property right which must be commenced within two years from the date the claim arose under section

93-2607(2). *LaTray v. Mannix Electric Co.*, 148 M 303, 419 P 2d 744, 745, but see *Bryant v. Hall*, 157 M 28, 482 P 2d 147.

#### Mother Bringing Action

Decedent's mother was real party in interest in wrongful death action where decedent left no surviving wife nor children and his father was dead. *Cowan v. Pacific Gamble Robinson Co.*, 232 F Supp 403, 405.

### 93-2810. (9067) When representative may sue for death, etc.

#### Limitation of Actions

An action under this section for wrongful death is governed by the three-year limitation in section 93-2605 rather than by the two-year limitation in section 93-2607. *Bryant v. Hall*, 157 M 28, 482 P 2d

147, overruling *Smith v. Wiprud*, 154 M 325, 463 P 2d 317.

#### References

*Stiles v. Gove*, 345 F 2d 991, 992.

93-2815. (9709) Joinder of state as defendant in certain actions. In any action or proceeding brought in any district court of the state of Montana affecting the title to real or personal property in which the state of Montana has or claims to have an interest or claim, the state of Montana may be made a party defendant to such actions or proceedings, and its rights or interests adjudicated.

History: En. Sec. 1, Ch. 210, L. 1921; re-en. Sec. 9079, R. C. M. 1921; amd. Sec. 1, Ch. 65, L. 1931; amd. Sec. 8, Ch. 234, L. 1977.

#### Amendments

The 1977 amendment deleted "provided, however, that in no event shall any money judgment be rendered against the state of Montana in any action or proceeding

brought under the provisions of this act" from the end of the section; and made minor changes in punctuation.

#### Repealing Clause

Section 9 of Ch. 234, Laws 1977 read "Sections 11-1305, 11-1306, 16-2731, 16-2732, 16-2733, 31-172, 46-243, 69-6405, and 75-5940, R. C. M. 1947, are repealed."

### 93-2823. (9085) Tenants in common, etc., may sever in bringing, etc.

#### Assignor Bringing Action

Assignee of one-half interest of an overriding royalty agreement with plaintiff-assignor and defendant could not be joined as a party plaintiff in a suit to

compel defendant to pay the other half interest to plaintiff whether assignor was a trustee for the assignee or they were tenants in common. *Lowe & Lynn v. Flank Oil Co.*, 144 M 499, 398 P 2d 608.

### 93-2824. (9086) Action—when not to abate by death, marriage, etc.

#### Loss of Earnings

Where, in survivorship action under this section, jury returned verdict based only upon personal property belonging to decedent destroyed in accident, and awarded no damages for loss of earning capacity, district court did not abuse its discretion in granting new trial on damages only, since jury could not "disregard uncontradicted, credible nonopinion evidence" establishing decedent's earning capacity. *Putman v. Pollei*, 153 M 406, 457 P 2d 776.

submitted, and the verdict is supported by the evidence, and there is nothing incredible in the verdict, a new trial should not be granted and the original jury verdict should be allowed to stand. *Beebe v. Johnson*, — M —, 526 P 2d 128.

#### Personal Injuries Action

Suit for personal injuries filed by decedent prior to his death survived in favor of administratrix of his estate. *Pickett v. Kyger*, 151 M 87, 439 P 2d 57.

#### Wrongful Death Action

Where defendant's negligence caused a

#### Order for New Trial Reversed

Where a case has been fully and ably

boat collision, injured decedent but not seriously enough to cause death, and knocked him into the water where he drowned, there must have been an appreciable time between the collision and death, so that decedent had a cause of action for his injuries which survived. *Stephens v. Brown*, 160 M 453, 503 P 2d 667.

Decedent's mother was real party in interest in wrongful death action where decedent left no surviving wife nor children and his father was dead. *Cowan v. Pacific Gamble Robinson Co.*, 232 F Supp 403, 405.

**93-2830. (9092) Who may be sued on overdue negotiable instruments—transfer.** A holder of overdue bills of exchange and promissory notes, as described in 87A-3-104 may sue all the parties thereto collectively or severally, but if any of the parties thereto who are not primarily liable for the payment tender the amount of principal, interest, and costs thereon, the holder shall transfer the paper. If a judgment be rendered thereon, the holder shall assign the judgment to such party so making the tender, and in case of refusal he may be compelled to do so by summary proceedings instituted for that purpose in the district court of the district in which he resides.

**History:** En. Sec. 593, C. Civ. Proc. 1895; re-en. Sec. 6500, Rev. C. 1907; re-en. Sec. 9092, R. C. M. 1921; amd. Sec. 18, Ch. 265, L. 1977.

#### Amendments

The 1977 amendment inserted "as described in 87A-3-104" near the beginning of the first sentence; and made minor changes in phraseology and punctuation.

## CHAPTER 29—PLACE OF TRIAL OF CIVIL ACTIONS

**Section 93-2906.** Place of trial may be changed in certain cases.

**93-2908.** Papers to be transmitted—costs and fees—jurisdiction.

**93-2901. (9093) Certain actions to be tried where the subject, etc.**

#### References

*Beavers v. Rankin*, 142 M 570, 385 P 2d 640; *Tassie v. Continental Oil Co.*,

228 F Supp 807, 808; *Hidden Hollow Ranch v. Collins*, 146 M 321, 406 P 2d 365.

**93-2902. (9094) Other actions—where the cause, etc.**

#### Governor

Complaint that governor's executive order establishing multi-county planning districts was inconsistent with legislative resolution stated a cause of action arising in the county of the governor's official residence, and venue should have been

changed to Lewis and Clark county. *Guildroy v. Anderson*, 159 M 325, 497 P 2d 688.

#### References

*Hidden Hollow Ranch v. Collins*, 146 M 321, 406 P 2d 365.

**93-2903. (9595) Place of trial of actions against counties.**

#### Action by County against Nonresident

This section does not require a change of venue where a county brings action against a nonresident in the district court of that county. *Carter County v. Cambrian Corp.*, 143 M 193, 387 P 2d 904.

board does not constitute an action against the county, and such appeal is properly brought in the county where the plaintiff resides. *State ex rel. Hendrickson v. Gallatin County*, — M —, 526 P 2d 354.

#### References

*Tassie v. Continental Oil Co.*, 228 F Supp 807, 808.

#### Judicial Review

Appeal for judicial review of an administrative decision of the county welfare

**93-2904. (9096) Other actions, according to the residence, etc.****Action on Contract and in Tort**

In action in which complaint stated a claim for breach of contract and an inter-related and dependent claim in tort, the county of performance of the contract was the county in which any tort was committed for purpose of determining venue. *Slovak v. Kentucky Fried Chicken*, — M —, 518 P 2d 791.

**Burden of Proof**

In contract action, once defendant showed that his place of residence was other than where suit was brought, the burden of proof was on the plaintiff to meet the motion for change of venue. *Rapp v. Graham*, 145 M 371, 401 P 2d 579.

**Change of Venue**

Although express terms of construction loan agreement between borrowers residing in Lewis and Clark County and lender in Cascade County did not designate place of performance of the contract, district court of Lewis and Clark County properly denied motion of lender for change of venue of action for breach of the contract, where borrowers' affidavit in opposition to the motion showed that the contract was to be performed in Lewis and Clark County, the loan agreement, note and mortgage being executed in Lewis and Clark County for home to be built in that county and inspection, supervision and completion of the home were to take place in Lewis and Clark County where all bills were to be paid. *Brown v. First Federal Savings & Loan Assn. of Great Falls*, 144 M 149, 394 P 2d 1017, 1019.

Denial of defendant's motion for change of venue to place where he resided was improper, since, where plaintiff-relator did not plead the commission agreement itself, nor include it as an exhibit, there was no way of considering the venue matter except on the residence of the defendant. *Rapp v. Graham*, 145 M 371, 401 P 2d 579, distinguished in 160 M 482, 503 P 2d 659.

The provisions of this section are permissive only and where five separate actions were brought in four widely separated counties against the same defendant involving the same accident, court did not abuse its discretion in granting change of venue under section 93-2906, subdivision 3, to the place where the tort occurred, for the convenience of the witnesses. *Putro v. Mannix Electric, Inc.*, 147 M 314, 412 P 2d 410.

Under statute providing that on proper motion court must change place of trial when convenience of witnesses and ends of justice would be promoted and under

further statute requiring action to be tried in county in which defendants reside at commencement of action, defendants were entitled to have action moved to county upon which all agreed, which was residence of one defendant, which was place insurance contract was entered into, which was where tort occurred and which was most convenient for defendants and their witnesses. *Truck Ins. Exchange v. National Farmers Union Property & Cas. Co.*, 149 M 387, 427 P 2d 50.

**Construction**

Statutory provisions creating exceptions to the general rule recognizing a defendant's privilege to be sued in his own county will not be given a strained or doubtful construction. *Rapp v. Graham*, 145 M 371, 401 P 2d 579.

**Foreign Corporate Surety**

Action brought against foreign corporate surety without joinder of principal was properly venued in county where plaintiff resided, even though the bond assured a subcontract which was to be performed in another county and the residence of the subcontractor was in another county. *Morgen & Oswood Constr. v. United States Fidelity & Guaranty Co.*, — M —, 535 P 2d 170.

**Foreign Corporations**

A foreign corporation does not acquire residence for venue purposes in a particular county by appointing a resident of that county as its agent for service of process, and it may be sued in any county. *Foley v. General Motors Corp.*, 159 M 469, 499 P 2d 774.

**Performance of Contract**

In an action for breach of an oral agreement to lease farm land, venue was in the county where the estate of one of the defendants was being probated, in which the other defendants resided, in which the land was located, and in which service was made and the creditor's claim filed. *Erickson v. Toy*, 142 M 121, 385 P 2d 268.

If contract is to be performed in a county other than the county of defendant's residence, then the plaintiff has his choice of the two counties in which to sue. He may sue in the county where defendant resides or in the county where the contract is to be performed. The provisions of this section are permissive. *Brown v. First Federal Savings & Loan Assn. of Great Falls*, 144 M 149, 394 P 2d 1017, 1019.

In order for plaintiff to maintain action on contract in a county where defendant does not reside, the place of performance



must be evident either by express terms of contract, or by necessary implication that a county other than that of defendant's residence is intended to be the county of performance. *Brown v. First Federal Savings & Loan Assn. of Great Falls*, 144 M 149, 394 P 2d 1017, 1019.

To maintain suit in county other than that of defendant's residence, plaintiff must show clearly the facts relied on to bring the case within one of the exceptions to the rule. The contract must state clearly that it is to be performed in county other than that of defendant's residence so that no other fair construction can be placed upon it. *Rapp v. Graham*, 145 M 371, 401 P 2d 579.

In bringing suit where contract is to be performed, rather than place of defendant's residence, a mere direction by the seller as to the place of payment is not sufficient to maintain venue within exception to this section, nor can a promise to remit to cover the purchase price be sued upon by the seller in the county of the point to which the remittance is to be made. *Rapp v. Graham*, 145 M 371, 401 P 2d 579.

In suit against seller for breach of express warranty against diseased cattle, buyer properly exercised option in initiating suit in county where cattle were delivered as county where contract was to be performed. *Neely v. Steinbach*, 149 M 119, 423 P 2d 584.

Contract clause expressly requiring defendant to perform by making payments in county other than defendant's county of residence came within performance exception in statute thereby entitling plaintiff to institute action on contract in county in which payments were to be made. *McGregor v. Svare*, 151 M 520, 445 P 2d 571.

In action on account for grazing rentals on lands owned or controlled by plaintiff, trial court erred in granting motion for change of venue where action was predicated upon contract to be performed in county where action was brought. *Cormier Bros., Inc. v. Willcutt*, 154 M 297, 462 P 2d 889.

"Place of performance" rule regarding venue in contract actions was inapplicable in action based on implied contract that did not specify place of payment; change of venue to county where defendants resided was proper. *Bick v. Haidle*, 156 M 350, 480 P 2d 818.

Where intent of parties was that contract would be performed in either Cascade or Chouteau County and contract was performed in Cascade County until breach, venue of action on contract was in Cascade County rather than county of defendant's residence. *Armon v. Stewart*, — M —, 511 P 2d 8.

### Tort Actions

Attorney's advice to a client that a personal injury action had to be filed in the county where the cause arose was not improper or unethical. *Petition of Wasson*, 143 M 323, 389 P 2d 406.

Where the driver of one vehicle and the estate of the driver of the other vehicle had been joined as defendants in tort action, the one driver had no right to change of venue after the dismissal of the estate, since the plaintiff, in joining the resident estate as a defendant had reasonable grounds to believe that he had a cause of action against the resident estate. *Boucher v. Steffes*, 160 M 482, 503 P 2d 659.

Although either the county of residence of defendant or county where tort was committed was proper county in which to bring action for personal injury arising from accident, where none of the defendants were residents of Montana, the action was triable in any county designated by plaintiff in his complaint. *Tassie v. Continental Oil Co.*, 228 F Supp 807, 809.

Defendant is not entitled to a change of venue in personal injury action where plaintiff filed the action in the proper county. *Tassie v. Continental Oil Co.*, 228 F Supp 807, 809.

Where personal injury action arising from accident occurring in Fallon County, Montana, was commenced in Silver Bow County, Montana, by nonresident plaintiff, and nonresident defendants in removing action to federal district court designated Billings Division, but stated no statutory grounds for change of venue and did not show good cause for assignment to Billings Division, plaintiff was entitled to change of venue to Butte Division in which Silver Bow County was located. *Tassie v. Continental Oil Co.*, 228 F Supp 807, 810.

### References

*Hidden Hollow Ranch v. Collins*, 146 M 321, 406 P 2d 365; *Yeager v. Foster*, 146 M 330, 406 P 2d 370.

93-2906. (9098) Place of trial may be changed in certain cases. The court or judge must, on motion, change the place of trial in the following cases:

1. to 3. \* \* \* [Same as parent volume.]

#### 4. Superseded by Supreme Court Rule, 34 State Reporter 26.

**History:** Ap. p. Sec. 21, p. 46, Bannack Stat.; amd. Ch. 8, L. 3d Session 1866, which was set aside by Act of Congress of March 2, 1867; amd. Sec. 1, p. 68, L. 1867; amd. Sec. 27, p. 31, Cod. Stat. 1871; re-en. Sec. 62, p. 53, L. 1877; re-en. Sec. 62, 1st Div. Rev. Stat. 1879; re-en. Sec. 62, 1st Div. Comp. Stat. 1887; amd. Sec. 615, C. Civ. Proc. 1895; en. Ch. 2, Ex. L. 1903; re-en. Sec. 6506, Rev. C. 1907; re-en. Sec. 9098, R. C. M. 1921; amd. Sec. 1, Ch. 6, L. 1973. Cal. C. Civ. Proc. Sec. 397.

##### Supersession

Subsection 4, relating to change of trial when judge disqualified, is superseded by Supreme Court Rule 34 State Reporter 26. The Rule is printed in a note following sec. 93-901.

##### Amendments

The 1973 amendment rewrote and rearranged the language of subdivision (4) for clarity, but without change in substance.

##### Change of Venue

Under statute providing that on proper motion the court must change place of trial when convenience of witnesses and ends of justice would be promoted and under further statute requiring action to be tried in county in which defendants reside at commencement of action, defendants were entitled to have action moved to county upon which all agreed, which was residence of one defendant, which was place insurance contract was entered into, which was where tort occurred and which was most convenient for defendants and their witnesses. *Truck Ins. Exchange v. National Farmers Union Property & Cas. Co.*, 149 M 387, 427 P 2d 50.

##### Convenience of Witnesses

Where affidavit showed that five separate actions had been brought against defendant in four widely separated counties involving the same occurrence, trial court properly granted change of venue for the convenience of the witnesses to the county where accident occurred although affidavit omitted names of witnesses and nature of their testimony. *Putro v. Mannix Electric, Inc.*, 147 M 314, 412 P 2d 410.

##### County Taxpayers as Jurors

Where county brought an action for damages done to bridge struck by defendant's truck, it was not an abuse of discretion for the district court to deny a motion for a change of venue even though the jury was made up, necessarily, of taxpayers of that county, each of whom had a pecuniary interest of \$31. *Carter County v. Cambrian Corp.*, 143 M 193, 387 P 2d 904.

##### Multiple Causes of Action

Where the defendant is entitled to a change of venue on one cause of action in a complaint containing more than one cause of action, the motion for change must be granted even though the other cause or causes would be triable where the plaintiff commenced the action. *Beavers v. Rankin*, 142 M 570, 385 P 2d 640.

##### Multiple Defendants

Even after dismissal from an action on tort arising outside the state of the only defendants residing in the county where the action was brought, the remaining defendants were not entitled to have the venue changed to the county of their residence so long as the plaintiff reasonably believed in good faith, when he brought the action, that he had a cause of action against the defendants resident in the county where brought. *Boucher v. Steffes*, 160 M 482, 503 P 2d 659.

##### Time for Motion

Court's discretion in granting change of venue under subdivision 3 of this section cannot be exercised until after a defendant has answered, so that where action was brought under section 93-2904 in county where co-defendant lived, denial of first motion before defendant had answered applied only to the residency requirement of the co-defendant and did not bar determination of second motion made under this section after defendant had answered. *Putro v. Mannix Electric, Inc.*, 147 M 314, 412 P 2d 410.

##### References

*Tassie v. Continental Oil Co.*, 228 F Supp 807, 810; *State ex rel. Peery v. District Court*, 145 M 287, 400 P 2d 648; *Yeager v. Foster*, 146 M 330, 406 P 2d 370.

#### 93-2907. (9099) Superseded by Supreme Court Rule, 34 State Reporter 26.

##### Supersession

This section (Sec. 63, p. 53, L. 1877), relating to transfer of action when judge disqualified, is superseded by Supreme

Court Rule, 34 State Reporter 26. The Rule is printed in the note following section 93-901.

**93-2908. (9100) Papers to be transmitted—costs and fees—jurisdiction.** When an order is made transferring an action or proceeding for trial, the clerk of the court, or justice of the peace, must transmit the pleading and papers therein to the clerk or justice of the court to which it is transferred. The costs and fees thereof, and of filing the papers anew, must be paid by the party at whose instance the order was made, except that: (1) when the action is an action upon a contract, express or implied, for the direct payment of money, and no claim contained in the complaint exceeds one thousand dollars (\$1,000); (2) the county designated in the complaint is not the proper county; and (3) if the plaintiff will not within ten (10) days after request stipulate for change of venue and defendant files a motion for such change and such motion is thereafter granted; then the party filing the complaint must pay all costs and fees of filing the papers anew and all costs and fees, including reasonable attorney's fees to be fixed by the court incurred by the defendant by reason of the change of venue motion and hearing. The court to which an action or proceeding is transferred has and exercises over the same the like jurisdiction as if it had been originally commenced therein.

**History:** En. Sec. 64, p. 53, L. 1877; re-en. Sec. 64, 1st Div. Rev. Stat. 1879; re-en. Sec. 64, 1st Div. Comp. Stat. 1887; re-en. Sec. 617, C. Civ. Proc. 1895; re-en. Sec. 6508, Rev. C. 1907; re-en. Sec. 9100, R. C. M. 1921; amd. Sec. 1, Ch. 176, L. 1971. Cal. C. Civ. Proc. Sec. 399.

#### **Amendments**

The 1971 amendment added to the second sentence the language requiring payment of costs and fees by the party filing the complaint in the instances described in the numbered clauses.

### **CHAPTER 30—MANNER OF COMMENCING CIVIL ACTIONS—SERVICE OF SUMMONS**

#### **93-3002. (9106) Superseded—Supreme Court Order 10750.**

##### **Supersession**

This section (Sec. 23, p. 47, Bannack Stat.; Sec. 23, p. 139, L. 1867; Sec. 67, p. 54, L. 1877), relating to endorsement

of the complaint and issue of summons, is superseded by M. R. Civ. P., Rule 41(e) as amended by Sup. Ct. Ord. 10750.

#### **93-3008. (9112) Superseded—Supreme Court Order 10750.**

##### **Supersession**

This section (Sec. 1, Ch. 37, L. 1917; Sec. 1, Ch. 135, L. 1949; Sec. 1, Ch. 122, L. 1951), relating to service of process

on corporations through the secretary of state, is superseded by M. R. Civ. P., Rule 4 D, as amended by Sup. Ct. Ord. 10750.

#### **93-3011, 93-3012. (9115, 9116) Superseded—Supreme Court Order 10750.**

##### **Supersession**

These sections (Secs. 4, 5, Ch. 37, L. 1917), relating to service of process on corporations through the secretary of

state, are superseded by M. R. Civ. P., Rule 4 D, as amended by Sup. Ct. Ord. 10750.

#### **93-3020. (9124) Return of summons.**

##### **References**

Sewell v. Beatrice Foods Co., 145 M 337, 400 P 2d 892.



## CHAPTER 37—VERIFICATION OF PLEADINGS

**93-3702. (9163) Verification of pleadings.****References**

Rambur v. Diehl Lumber Co., 144 M  
84, 394 P 2d 745, 747.

## CHAPTER 40—ARREST AND BAIL IN CIVIL ACTIONS—WHEN HAD

Section 93-4002. When defendant may be arrested in a civil action.

**93-4002. (9194) When defendant may be arrested in a civil action.**  
The defendant may be arrested in the following cases:

(1) in an action for the recovery of money or damages, on a cause of action arising upon contract, express or implied, when the defendant is about to depart from the state, with intent to defraud his creditors; or when the action is for willful injury to person, to character, or to property, knowing the property to belong to another;

(2) in an action for a fine or penalty or for money or property fraudulently misapplied or converted to his own use by a public officer, an officer of a corporation, or an attorney, factor, broker, agent, or clerk, in the course of his employment as such, or by any other person in a fiduciary capacity; for misconduct or neglect in office or in a professional employment; or for a willful violation of duty;

(3) in an action to recover possession of personal property unjustly obtained, when the property or any part thereof has been concealed, removed, or disposed of so that it cannot be found or taken by the sheriff;

(4) when the defendant has been guilty of fraud in contracting the debt, incurring the obligation for which the action is brought, or in concealing or disposing of the property or for taking, detention, or conversion of which the action is brought;

(5) when the defendant has removed or disposed of his property or is about to do so with intent to defraud his creditors.

**History:** En. Sec. 73, p. 148, L. 1867; re-en. Sec. 81, p. 44, Cod. Stat. 1871; re-en. Sec. 119, p. 168, L. 1877; re-en. Sec. 119, 1st Div. Rev. Stat. 1879; re-en. Sec. 121, 1st Div. Comp. Stat. 1887; re-en. Sec. 801, C. Civ. Proc. 1895; re-en. Sec. 6596, Rev. C. 1907; re-en. Sec. 9194, R. C. M. 1921; amd. Sec. 69, Ch. 359, L. 1977. Cal. C. Civ. Proc. Sec. 479.

**Amendments**

The 1977 amendment deleted "embezzled" after "property" near the beginning of subdivision (2); and made minor changes in phraseology, punctuation and style.

## CHAPTER 41—CLAIM AND DELIVERY OF PERSONAL PROPERTY

Section 93-4102. Affidavit and its requisites.

**93-4102. (9221) Affidavit and its requisites.** (1) When a delivery is claimed, an affidavit must be made by the person claiming the property, or someone in his behalf, stating:

(a) Facts which establish reasonable belief that the person claiming the property is the owner, or is lawfully entitled to possession and that

the seizure is necessary to prevent the removal or destruction of the property;

(b) That the property is wrongfully detained by the defendant;

(c) That the same has not been taken for a tax, assessment, or fine, pursuant to statute; or seized, under an execution or an attachment against the property of the person claiming the property; or, if so seized, that it is by statute exempt from seizure; and,

(d) Particularly describing the property and the actual value of the property.

(2) The sheriff shall make no seizure unless an order from a judge of the court having jurisdiction of the cause is attached to the affidavit. The judge may sign such an order if he is satisfied:

(a) That the party seeking possession of the property has made a prima facie showing of his right to possession and the necessity for seizure at a show cause hearing before him with at least three days' notice to the person in possession of the property, if such person cannot be found for personal service, notice posted on the property and in three (3) public places in the county where the property is located is sufficient service for this purpose; or

(b) That the delay caused by notice and a hearing would seriously impair the remedy sought by the party seeking possession. Evidence of such impairment must be presented in open court and the court must set forth with specificity the reasons why such delay would seriously impair the remedy sought by the person seeking possession.

**History:** En. Sec. 72, p. 56, Bannack Stat.; amd. Sec. 100, p. 151, L. 1867; re-en. Sec. 117, p. 49, Cod. Stat. 1871; re-en. Sec. 155, p. 75, L. 1877; re-en. Sec. 155, 1st Div. Rev. Stat. 1879; amd. Sec. 1, p. 103, L. 1885; re-en. Sec. 157, 1st Div. Comp. Stat. 1887; re-en. Sec. 841, C. Civ. Proc. 1895; re-en. Sec. 6623, Rev. C. 1907; re-en. Sec. 9221, R. C. M. 1921; amd. Sec. 1, Ch. 362, L. 1975. Cal. C. Civ. Proc. Sec. 510.

#### Amendments

The 1975 amendment inserted the subsection (1) designation; redesignated former subdivisions 1 to 4 as subdivisions (1)(a) to (1)(d); substituted "person claiming the property" for "plaintiff" throughout the section; substituted subdivision (1)(a) for former subdivision 1; inserted "Particularly describing the property and" at the beginning of subdivision (1)(d); and added subsection (2). For prior version, see parent volume.

### 93-4104. (9223) Undertaking and duty of sheriff.

#### Constitutionality

Replevin provisions which authorized state agents to seize property in possession of another person upon application of claimant and subsequent posting of bond prior to a hearing to determine parties' rights to possession are invalid as they work a deprivation of property without due process of law by denying an oppor-

tunity to be heard before chattels are taken from the possessor. *Fuentes v. Shevin*, 407 US 67, 32 L Ed 2d 556, 92 S Ct 1983, distinguished in 527 F 2d 23, 410 F Supp 344, 410 F Supp 482, 412 F Supp 1072, 415 F Supp 535, 418 F Supp 695, explained in 527 F 2d 597, 410 F Supp 34.

## CHAPTER 42—INJUNCTION

Section 93-4204.1. Names, addresses, and statement of injury required in certain actions  
 93-4207. Security upon injunction.  
 93-4215. Injunction against price fixing or consumer abuses.  
 93-4216. Injunction may issue without bond.

**93-4203. (9242) Injunction—when not allowed.****Discretionary Appointment**

Taxpayer was not entitled to an injunction in action questioning the qualifications of supervisor appointed by board of railway commissioners in the proper exercise of their discretion. *Steel v. Board of Railroad Commrs.*, 144 M 432, 397 P 2d 101.

**Enforcement of Public Statute**

Subdivision 4 does not prohibit injunctive relief against implementation of an

appraisal where such implementation would be illegal and unauthorized. *Larson v. State*, — M —, 534 P 2d 854, overruling *State ex rel. Keast v. Krieg*, 145 M 521, 402 P 2d 405.

District court acted beyond its jurisdiction by issuing injunction to prevent board of equalization from revising grading and valuation of nonirrigated farm land pursuant to section 84-429.7 et seq. *State ex rel. Lord v. District Court*, 154 M 269, 463 P 2d 323.

**93-4204. (9343) Injunction order—when granted.****Real Estate Cases**

An order enjoining landowner from proceeding with mobile home subdivision on his land until zoning regulations were adopted was improper because it was

impossible to predict whether landowner's plans would conflict with zoning regulations finally adopted. *State ex rel. Corning v. District Court of 18th Judicial District*, 156 M 81, 474 P 2d 701.

**93-4204.1. Names, addresses, and statement of injury required in certain actions.** Whenever an action for injunctive relief is initiated by a citizens group or other public interest association and it appears by the complaint that there is an injury to a property or civil right of individual members of the association, which injury is distinguishable from an injury to the public generally, the names and addresses of injured members and a statement of the injury shall be provided in the complaint. An injunction may not be granted unless such information is provided in the complaint.

**History:** En. 93-4204.1 by Sec. 1, Ch. 170, L. 1977.

**Title of Act**

An act to require names and addresses

of injured parties and a statement of injury in a complaint for injunction filed by a citizens group or other public interest association.

**93-4205. (9244) Injunction order, etc.****Injunction Granted after Hearing**

Portion of statute pertaining to affidavits does not apply to injunction issued on basis of hearing on order to show cause. *State ex rel. Martin v. District Court, Twelfth Judicial Dist.*, 151 M 41, 438 P 2d 563.

**Verification of Complaint**

The purpose of the requirement under

this section that a complaint be verified is to ensure good faith and truthfulness on the part of the complainant; where the requirement was not met, but at the trial complainant testified under oath as to matters found in the complaint, the issue of noncompliance was rendered moot. *De-Laurentis v. Vainio*, — M —, 549 P 2d 461.

**93-4206. (9245) When notice required.****Injunction Without Notice**

Petition by female minor for injunction prohibiting rodeo from refusing to allow her to participate as a bare-back bronc rider was not such an emergency as to invoke the extraordinary remedies of the court without notice, bond, or plenary

hearing. *State ex rel. Reno v. District Court*, — M —, 529 P 2d 1407.

**References**

*State ex rel. Keast v. Krieg*, 145 M 521, 402 P 2d 405.



**93-4207. (9246) Security upon injunction.** On granting an injunction or restraining order, the court or judge may require, except when the state, a county, or any subdivision thereof, or municipal corporation, or a married person in a suit for divorce against his or her spouse, is a party plaintiff, a written undertaking on the part of the plaintiff, with sufficient sureties, to the effect that the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as such party may sustain by reason of the injunction, if the court finally decide that the plaintiff was not entitled thereto. Within five days after the service of the injunction, the defendant may except to the sufficiency of the sureties. If the plaintiff fails to do so, such plaintiff is deemed to have waived all objections to them. When excepted to, the plaintiff's sureties, upon notice to the defendant of not less than two nor more than five days, must justify before a judge or clerk in the same manner as upon bail on arrest, and upon failure to justify, or if others in their place fail to justify at the time and place appointed, the order granting an injunction shall be dissolved.

**History:** Ap. p. Sec. 86, p. 59, Bannack Stat.; re-en. Sec. 115, p. 154, L. 1867; re-en. Sec. 132, p. 52, Cod. Stat. 1871; re-en. Sec. 174, p. 79, L. 1877; re-en. Sec. 174, 1st Div. Rev. Stat. 1879; re-en. Sec. 176, 1st Div. Comp. Stat. 1887; en. Sec. 874, C. Civ. Proc. 1895; re-en. Sec. 6646, Rev. C. 1907; re-en. Sec. 9246, R. C. M. 1921; amd. Sec. 53, Ch. 535, L. 1975. Cal. C. Civ. Proc. Sec. 529.

#### **Amendments**

The 1975 amendment substituted "married person" for "married woman" in the first sentence; substituted "his or her spouse" for "her husband" in the first sentence; substituted "plaintiff" for "he" in the third sentence, and made minor changes in phraseology.

### **93-4213. (9252) Costs may be waived.**

#### **Injunction Dissolved**

Defendants requested, and were entitled to, costs and attorney fees in action where plaintiffs received an injunction pendente lite ordering defendants to re-

move a fence from the road and to allow plaintiffs to use the road, but the evidence later showed that plaintiffs had no easement rights in the defendant's land. *Godfrey v. Pilon*, — M —, 529 P 2d 1372.

### **93-4215. (9254) Injunction against price fixing or consumer abuses.**

(1) Whenever any action, either civil or criminal, shall have been instituted in court in this state against any person for price fixing or regulating the production of any article of commerce or of the product of the soil, for consumption by the people, the court in which such action is pending is authorized to issue an injunction to restrain any such person from doing business in this state pending the final determination of said action so instituted.

(2) When the public service commission is conducting an adjudicatory proceeding or formal investigation relating to continuation or interruption of service upon the motion of the consumer counsel, or the interested person or his legal representative, a district court may, upon the application of the consumer counsel, or the interested person or his legal representative, enter a restraining order against any person respondent in the adjudicatory proceeding or investigation. Such a restraining order may prohibit the respondent, his agents, employees, licensees, and assignees, from acting in the manner complained of in the proceeding before the commission until the commission has rendered its decision in the matter.

The restraining order may include an order to show cause why the order should not become an injunction for the duration of the proceeding before the commission.

**History:** En. Sec. 1, Ch. 93, L. 1905; re-en. Sec. 6654, Rev. C. 1907; re-en. Sec. 9254, R. C. M. 1921; amd. Sec. 56, Ch. 100, L. 1973; amd. Sec. 3, Ch. 138, L. 1975.

#### Amendments

The 1973 amendment substituted "for price fixing or regulating the production of any article of commerce or of the product of the soil, for consumption by the people" for "for the purpose of enforcing the provisions of section 20 of article XV of the constitution of the state of Montana, or any law or laws enacted pursuant to or for carrying out the same"; and deleted "in violation of said section of the constitution, or in violation of any law or laws enacted pursuant to or for the purpose of enforcing said section of

the constitution" after "doing business in this state" near the end of the section.

The 1975 amendment inserted the subsection (1) designation; substituted "any person for price fixing or regulating the production of any article of commerce or of the product of the soil" near the beginning of subsection (1) for "any person or persons, corporation or corporations, foreign or domestic"; deleted "if it be a court of record, or if not, then any court of record in this state, shall be" after "action is pending" in the middle of the section; deleted "or persons, corporation or corporations, foreign or domestic" after "restrain any such person" near the end of the section; added subsection (2); and made minor changes in phraseology.

**93-4216. (9255) Injunction may issue without bond.** Said injunction shall issue as in cases of equity, without bond, upon the application of the county attorney of the county in which such action is pending, or upon the application of the attorney general, in the name of the state of Montana, upon a prima facie showing that an action, civil or criminal, has been so instituted and is so pending, charging such person or persons, corporation or corporations, foreign or domestic, with such violation.

**History:** En. Sec. 2, Ch. 93, L. 1905; re-en. Sec. 6655, Rev. C. 1907; re-en. Sec. 9255, R. C. M. 1921; amd. Sec. 57, Ch. 100, L. 1973.

#### Amendments

The 1973 amendment substituted "such violation" at the end of the section for "a violation of said section of the consti-

tution, or of any law or laws enacted thereunder."

#### Repealing Clause

Section 58 of Ch. 100, Laws 1973 read "Sections 3-101.1, 4-348, 16-405, 16-2407, 23-2701.1, 41-1609, 75-6410.1, 84-211 and 84-707, R. C. M. 1947, are repealed."

### CHAPTER 43—ATTACHMENT

- Section 93-4301. When attachment may issue.  
 93-4302.1. Affidavit required for attachment.  
 93-4304. Undertaking.  
 93-4304.1. Writ—when issued.  
 93-4304.2. Postseizure hearing.  
 93-4331.1. Release of attachment by clerk where no proceedings taken in main action.

**93-4301. (9256) When attachment may issue.** (1) A plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached as security for the satisfaction of any judgment that may be recovered.

(2) Property may be attached in:

(a) an action upon a contract, express or implied, for the direct payment of money, where the contract:

(i) is not secured by any mortgage or lien upon real property;  
 or

(ii) is originally secured and such security has, without any act of the plaintiff or the person to whom the security was given, become valueless; and

(b) an action based upon a statutory stockholders' liability.

(3) Attachment may not issue if the defendant gives security to pay the judgment.

**History:** Earlier acts were Sec. 91, p. 60, Bannack Stat.; amd. Sec. 120, p. 156, L. 1867; amd. Sec. 11, p. 64, L. 1869; amd. Sec. 137, p. 54, Cod. Stat. 1871; amd. Sec. 2, p. 40, Ex. L. 1873; re-en. Sec. 179, p. 82, L. 1877; re-en. Sec. 179, 1st Div. Rev. Stat. 1879; re-en. Sec. 181, 1st Div. Comp. Stat. 1887.

En. Sec. 890, C. Civ. Proc. 1895; re-en. Sec. 6656, Rev. C. 1907; re-en. Sec. 9256, R. C. M. 1921; amd. Sec. 1, Ch. 82, L. 1931; amd. Sec. 11-159, Ch. 264, L. 1963; amd. Sec. 1, Ch. 299, L. 1977. Cal. C. Civ. Proc. Sec. 537.

#### Amendments

The 1977 amendment made minor

changes in phraseology, punctuation and style. For prior version, see parent volume.

#### Constitutionality

Where prejudgment writ of attachment reached no property but real property, of which the debtor retained the ownership, actual use and physical control, and therefore did "nothing more than impinge upon economic interests of the property owner," it did not violate the notice and hearing requirements of the fourteenth amendment due process clause, and was therefore constitutional. *Bustell v. Bustell*, — M —, 555 P 2d 722.

### 93-4302. (9257) Repealed.

#### Repeal

Section 93-4302 (Sec. 891, C. Civ. Proc. 1895; Sec. 11-160, Ch. 264, L. 1963), re-

lating to the contents of an affidavit for a writ, was repealed by Sec. 7, Ch. 299, Laws 1977.

**93-4302.1. Affidavit required for attachment.** When attachment of a defendant's property is sought, an affidavit must be made by the plaintiff or someone in his behalf stating:

(1) facts which show the defendant is indebted to the plaintiff in the manner specified in 93-4301(2);

(2) that the attachment is not sought to hinder, delay, or defraud any creditor of the defendant;

(3) facts creating a reasonable belief that the defendant:

(a) is leaving or about to leave this state taking with him property, money, or other effects which might be subjected to payment of the debt;

(b) is disposing or about to dispose of his property which would be subject to execution;

(c) has the power to dispose of or conceal or remove from the state property which would be subject to execution; or

(d) is likely to suffer liens or encumbrances on his property which would be subject to execution;

(4) a particular description and the actual value of the property to be attached.

**History:** En. 93-4202.1 by Sec. 2, Ch. 299, L. 1977.

#### Title of Act

An act to revise the attachment law; providing for judicial supervision of the issuance of a writ of attachment and pro-

viding for preseizure notice and hearing or in certain cases for immediate post-seizure hearing; amending sections 93-4301, 93-4304, and 93-6908, R. C. M. 1947; and repealing section 93-4302, R. C. M. 1947.



**93-4304. (9259) Undertaking.** (1) Before issuing the writ, the court must require a written undertaking on the part of the plaintiff, with two or more sufficient sureties to be approved by the court, in a sum not less than double the amount claimed by the plaintiff, if such amount be \$1,000 or under, or, in case the amount so claimed by plaintiff shall exceed \$1,000, then in a sum equal to such amount. In no case shall an undertaking be required exceeding in amount the sum of \$20,000. The condition of such undertaking shall be to the effect that if the defendant recovers judgment, or if the court finally decides that the plaintiff was not entitled to an attachment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages he may sustain by reason of the issuing of the attachment, not exceeding the sum specified in the undertaking.

(2) At any time within 30 days after the service of summons, the defendant may except to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objections to them.

(3) When excepted to, the plaintiff's sureties, upon notice to the defendant of not less than 2 days nor more than 10 days, must justify before a judge of the district court, and upon failure to justify, or if others in their place fail to justify, at the time and place appointed, the judge shall issue an order vacating the writ of attachment.

**History:** Ap. p. Sec. 93, p. 61, Bannack Stat.; amd. Sec. 122, p. 156, L. 1867; amd. Sec. 12, p. 65, L. 1869; amd. Sec. 7, p. 75, L. 1870; amd. Sec. 138, p. 54, Cod. Stat. 1871; amd. Sec. 20, p. 56, L. 1874; amd. Sec. 180, p. 82, L. 1877; re-en. Sec. 180, 1st Div. Rev. Stat. 1879; amd. Sec. 6, p. 9, L. 1881; re-en. Sec. 182, 1st Div. Comp. Stat. 1887; en. Sec. 892, C. Civ. Proc. 1895; re-en. Sec. 6659, Rev. C. 1907; re-en. Sec. 9259, R. C. M. 1921; amd. Sec. 1, Ch. 15, L. 1951; amd. Sec. 1, Ch. 303, L. 1967; amd. Sec. 3, Ch. 299, L. 1977, Cal. C. Civ. Proc. Sec. 539.

#### Amendments

The 1967 amendment increased the maximum amount of an undertaking from \$10,000 to \$20,000.

The 1977 amendment substituted "court" for "clerk" twice in the first sentence of subsection (1); deleted references to clerk after references to judge in two places in subsection (3); and made minor changes in phraseology, punctuation and style.

**93-4304.1. Writ—when issued.** A judge of a court having jurisdiction of the cause may issue a writ of attachment when:

- (1) he has received the affidavit described in 93-4302.1;
- (2) he has approved the undertaking required in 93-4304; and
- (3) the party seeking attachment has made a prima facie showing:
  - (a) in the case of real property, of his right to attachment and the necessity for seizure;
  - (b) in the case of personal property:
    - (i) of his right to attachment and the necessity for seizure at a show cause hearing before the court with at least 3 days' notice to the defendant; if the defendant cannot be found for personal service, notice shall be posted on the property and in three public places in the county where the property is located; or
    - (ii) of his right to attachment and the necessity for seizure and that the delay caused by notice and a hearing would seriously impair the

remedy sought by the party seeking possession. Evidence of such impairment must be presented in open court and the court must set forth with specificity the reasons why such delay would seriously impair the remedy sought by the person seeking attachment.

**History:** En. 93-4304.1 by Sec. 4, Ch. 299, L. 1977.

**93-4304.2. Postseizure hearing.** (1) When a writ has been issued upon real property or upon the showing specified in 93-4304.1(3)(b)(ii), the defendant may challenge the seizure of the property at a hearing before the court to be held within 3 days after the seizure. Notice of the right to a postseizure hearing shall be served personally on the defendant, or if the defendant cannot be found for personal service, notice shall be posted on the property and in three public places in the county where the property is located.

(2) At such hearing the defendant may challenge the merit of the underlying action, the need for the prejudgment seizure of property, or both. The writ shall be quashed if the court makes a preliminary finding that:

(a) the plaintiff cannot establish the prima facie validity of his claim; or

(b) the plaintiff cannot establish by a preponderance of the evidence the need for the continued attachment of the defendant's property.

**History:** En. 93-4304.2 by Sec. 5, Ch. 299, L. 1977.

#### **93-4314. (9267) Garnishment—when garnishee liable to plaintiff.**

<b>References</b>	Pan American Petroleum Corp., 353 F
Great Falls Transfer & Storage Co. v.	2d 348.

**93-4331.1. Release of attachment by clerk where no proceedings taken in main action.** If a writ of attachment has been levied on real property as provided in section 93-4307, R. C. M. 1947, and no proceedings have been taken in the action in which the attachment was issued for a period of five years, the clerk of court shall upon application of the defendant or the record owner of such real property issue a release of the attachment and a copy of such release shall be filed with the county clerk where the writ of attachment and notice thereof is filed and the county clerk shall file and index such release as any other releases of attachment.

<b>History:</b> En. Sec. 1, Ch. 97, L. 1965.	ment on real property may be released by
<b>Title of Act</b>	the clerk of court where no action has
An act providing that a lien of attach-	been taken to foreclose such lien for a
	period of five years.

#### **93-4335. (9288) Different attachments—when liens accrue.**

##### **Conflicting Attachments**

Since, for purposes of garnishment, a debt has no fixed situs but may be reached in any jurisdiction where the person found owing it can be located, Wyoming court was bound to give full faith and credit to Montana court in de-

termining which garnishor had prior claim where writs of attachment had been issued by different parties on the same garnishee in both states. Great Falls Transfer & Storage Co. v. Pan American Petroleum Corp., 353 F 2d 348.

**93-4342. (9295) Repealed.****Repeal**

This section (Sec. 9295, R. C. M. 1921), relating to attachment of stocks of foreign

corporations, was repealed by Sec. 143, Ch. 300, Laws 1967.

**CHAPTER 44—RECEIVERS****Section 93-4401. Appointment of receiver.**

**93-4401. (9301) Appointment of receiver.** A receiver may be appointed by the court in which an action is pending, or by the judge thereof:

1. to 4. \* \* \* [Same as parent volume.]

5. In all other cases where receivers have heretofore been appointed by the usages of courts of equity.

**History:** Ap. p. Sec. 116, p. 67, Ban-nack Stat.; re-en. Sec. 143, p. 160, L. 1867; re-en. Sec. 179, p. 62, Cod. Stat. 1871; en. Sec. 221, p. 93, L. 1877; re-en. Sec. 221, 1st Div. Rev. Stat. 1879; re-en. Sec. 229, 1st Div. Comp. Stat. 1887; re-en. Sec. 950, C. Civ. Proc. 1895; re-en. Sec. 6698, Rev. C. 1907; re-en. Sec. 9301, R. C. M. 1921; amd. Sec. 142, Ch. 300, L. 1967. Cal. C. Civ. Proc. Sec. 564.

appointment of receiver at instance of bank merely to protect the price of the stock was erroneous. *State ex rel. Larry C. Iverson, Inc. v. District Court*, 146 M 362, 406 P 2d 828.

**Extraordinary Remedy**

Appointment of a receiver being a "drastic" remedy, which deprives the law-ful owner of property the right to manage and control his own interests, the power to appoint a receiver should be exercised sparingly only upon a strong showing, and not as of course. If the desired out-come may be achieved in any other way, then this course should be followed. *State ex rel. Larry C. Iverson, Inc. v. District Court*, 146 M 362, 406 P 2d 828.

**Amendments**

The 1967 amendment deleted subdivi-sion 5 and redesignated former subdivi-sion 6 as subdivision 5.

**Debt as Basis for Appointment**

Where bank held stock as security on loans made by farming corporation, but it appeared that stockholders were, in good faith, planning to meet their obli-gation and the corporation was solvent,

**References**

*Thisted v. Tower Management Corp.*, 147 M 1, 409 P 2d 813.

**93-4406. (9306) Powers of receivers.****References**

*Thisted v. Tower Management Corp.*, 147 M 1, 409 P 2d 813.

**CHAPTER 47—JUDGMENTS IN GENERAL****Section 93-4707. Judgment for or against married person.**

**93-4707. (9319) Judgment for or against married person.** Judgment for or against a married person may be rendered and enforced as if such person were single.

**History:** En. Sec. 1006, C. Civ. Proc. 1895; re-en. Sec. 6716, Rev. C. 1907; re-en. Sec. 9319, R. C. M. 1921; amd. Sec. 54, Ch. 535, L. 1975.

**Amendments**

The 1975 amendment substituted "mar-ried person" for "married woman"; and made a minor change in phraseology.



# CHAPTER 49—ISSUES—MODE OF TRIAL AND POSTPONEMENT— PROCEDURE TO PROCURE JURY TRIAL

## 93-4910. (9332) Motion to postpone a trial, etc.

### Continuance

Since this is a discretionary statute, denial of state's motion for continuance in condemnation action was not an abuse of discretion where landowner had made a full and complete admission as to testimony state's value witness would have given. *State Highway Commission v. Cooper*, — M —, 521 P 2d 190.

### Criminal Cases

Court did not commit prejudicial error when it overruled criminal defendant's objection to county attorney's motion for continuance even though motion was not supported by required affidavit where motion was made just prior to end of trial court's day and trial resumed promptly on next morning. *State v. Crockett*, 148 M 402, 421 P 2d 722.

# CHAPTER 50—TRIAL BY JURY—FORMATION OF JURY—CHALLENGES

Section 93-5008. Procedure when insufficient number attend.

93-5010. Challenge.

93-5008. (9341) Procedure when insufficient number attend. (1) If a sufficient number of jurors duly drawn and notified do not attend to form a jury, the district judge shall, pursuant to an order to be entered in the minutes, in the presence of the clerk of the court draw a sufficient number of ballots from the box to complete the jury. The sheriff shall notify the persons thus drawn to attend immediately or at a time fixed by court. If for any reason a sufficient number of jurors to try the issue is not obtained from the persons notified under an order made as prescribed in this section, the court may make another order or successive orders until a sufficient number is obtained.

(2) Each person so notified must attend at the time required by the notice and, unless excused by the court or set aside, must serve as a juror upon the trial. For a neglect or refusal to do so, he may be fined in the same manner as any other trial juror regularly drawn and notified, and he is subject to the same exceptions and challenges as any other trial juror.

History: En. Sec. 1057, C. Civ. Proc. 1895; re-en. Sec. 6738, Rev. C. 1907; re-en. Sec. 9341, R. C. M. 1921; amd. Sec. 5, Ch. 151, L. 1937; amd. Sec. 5, Ch. 3, L. 1939; amd. Sec. 46, Ch. 344, L. 1977.

### Amendments

The 1977 amendment deleted "or a jury

is impaneled to another cause and not discharged" after "form a jury" near the beginning of subsection (1); substituted "the box" near the end of the first sentence of subsection (1) for "box No. 3, specified in section 93-1506"; and made minor changes in phraseology, punctuation and style.

93-5010. (9343) Challenge. Each party may challenge the jury or jurors as follows:

1. to 3. \* \* \* [Same as parent volume.]

There can be only one challenge on a side to the array or panel, which may be made by one or more of the parties. A challenge to the array or panel may be made and the whole array or panel set aside by the court, when the jury was not selected, drawn, summoned or notified as prescribed by law. Challenges to individual jurors are for cause or peremptory. Each party is entitled to four peremptory challenges, except

as provided for under section 93-1205. If no peremptory challenges are taken until the panel is full, they must be taken by the parties alternately, commencing with the plaintiff.

**History:** Ap. p. Sec. 133, p. 69, Ban-nack Stat.; re-en. Sec. 161, p. 164, L. 1867; amd. Sec. 197, p. 66, Cod. Stat. 1871; amd. Sec. 248, p. 100, L. 1877; amd. Sec. 248, 1st Div. Rev. Stat. 1879; re-en. Sec. 257, 1st Div. Comp. Stat. 1887; re-en. Sec. 1059, C. Civ. Proc. 1895; re-en. Sec. 6740, Rev. C. 1907; re-en. Sec. 9343, R. C. M.

1921; amd. Sec. 1, Ch. 300, L. 1971. Cal. C. Civ. Proc. Sec. 301.

#### Amendments

The 1971 amendment added the excep-tion to the fourth sentence of the second paragraph; and made a minor change in punctuation.

### 93-5011. (9344) Challenges for cause.

#### Taxpayers of Plaintiff County

Where county brought an action for damages to bridge, it was not an abuse of discretion for the district court to deny a motion for a change of venue even though

the jury was necessarily made up of tax-payers of that county each of whom had a pecuniary interest averaging \$31. *Carter County v. Cambrian Corp.*, 143 M 193, 387 P 2d 904.

## CHAPTER 51—TRIAL—CONDUCT OF THE TRIAL

### 93-5101. (9349) Order of trial.

#### Instructions to Jury

Plaintiff gave implied consent and waived objection by actively participating without objection in proceedings wherein trial court gave oral answer to question asked by the jury and orally confirmed the correctness of other instructions orally

stated by counsel. *Seder v. Peter Kiewit Sons' Co.*, 156 M 322, 479 P 2d 448.

#### References

*Boehler v. Sanders*, 146 M 158, 404 P 2d 885.

### 93-5102. (9350) View by jury of the premises.

#### Discretion of Trial Court

A viewing is within the discretion of the trial court, even where there has been a change in the condition of the scene of the accident or the thing which contributed to the accident. *Clark v. Wor-rall*, 146 M 374, 406 P 2d 822.

cause of the accident, it was not an abuse of discretion to allow the jury to view the premises on which the accident oc-curred after the alterations had been made. *Clark v. Worrall*, 146 M 374, 406 P 2d 822.

#### References

*Wolfe v. Northern Pacific R. Co.*, 147 M 29, 409 P 2d 528.

#### Time of Viewing

Where alterations to defendant's bowl-ing alley had little relationship to the

### 93-5104. (9352) Jury may take with them certain papers.

#### Subsequent Request by Jury

Trial court did not err in permitting state's exhibits, consisting of photographs of scene of accident, to be taken to jury

room when asked for by jury about one hour after it began deliberation. *State v. Medicine Bull*, 152 M 34, 445 P 2d 916.

### 93-5105. (9353) Deliberation of jury—how conducted.

#### Communication with Alternate Juror

It was reversible error for alternate juror to be in the jury room for about fifteen minutes during deliberations and to have lunch with the jury; court is not at liberty to make exceptions based on length of time, actual harm, or fact that person involved was a sworn alternate

juror. *State Highway Commission v. Dunks*, — M —, 531 P 2d 1316.

#### Misconduct of Jury

When the jury retires to the jury room it should be concerned only with the evidence and the law; the verdict, thus, is a result of a fair expression of opinion

by all the jurors. *Schmoyer v. Bourdeau*, 148 M 340, 420 P 2d 316, 317.

Trial court did not err in denying plaintiff's motion for a new trial, on the ground of misconduct of jury during its deliberations, supported by affidavits of four jurors indicating that the irregularity was not on a material matter in dis-

pute, where plaintiff was probably not prejudiced by juror's misconduct in improperly referring to prior litigation in which plaintiff had been involved, the poll of the jury showing an eight to four verdict for the plaintiff. *Schmoyer v. Bourdeau*, 148 M 340, 420 P 2d 316, 317.

### 93-5106. (9354) May come into court for further instructions.

#### Brought into Court

Although this section provides that the jury may request that they be brought into court, this is not mandatory and the jury may send an inquiry out to the court. *State ex rel. State Highway Commission v. Wheeler*, 148 M 246, 419 P 2d 492, 498.

#### Oral Instructions

Plaintiff gave implied consent and

waived objection by failure to object and by active participation in proceedings wherein trial court, without the presence of a stenographer, gave oral answer to question asked by the jury and orally confirmed the correctness of other instructions orally requested by counsel. *Seder v. Peter Kiewit Sons' Co.*, 156 M 322, 479 P 2d 448.

### 93-5110. (9358) Verdict—how declared—form of—polling the jury.

#### Poll of Jury

Court abused discretion in granting new trial based solely on ground that it had erred in refusing to grant request for poll of jury; error, if any, was harmless in light of evidence affirmatively showing that verdict was rendered in open court in presence of all counsel, that, in response

to question by judge, foreman of jury advised him they had agreed upon verdict and that, following reading of verdict, judge inquired if it was true verdict of at least eight of them and jury answered in affirmative. *Martello v. Darlow*, 151 M 232, 441 P 2d 175.

## CHAPTER 52—THE VERDICT—GENERAL AND SPECIAL—DIRECTED WHEN

### 93-5205. (9364) Directed verdict—when.

#### Evidence Supporting Directed Verdict

Denial of motion for directed verdict by lessor of destroyed building being sued by lessee claiming that premises were repairable was cause for reversal where, viewing evidence most favorable to plaintiff lessee and considering as proven everything which evidence tended to prove, reasonable man could come to no other conclusion but that building was destroyed. *Solich v. Hale*, 150 M 358, 435 P 2d 883.

In negligence suit, defendant was entitled to directed verdict where only evidence attempting to establish proximate causal connection between breach of duty and plaintiff's injuries and damages were reports of persons not present at trial, which were private documents and not part of a case file of attending physicians. *Pickett v. Kyger*, 151 M 87, 439 P 2d 57, distinguished in 157 M 277, 285, 485 P 2d 54.

#### Inferences from Evidence

In passing on a motion for a directed verdict the court will consider the evi-

dence in the light most favorable to the party against whom the motion is directed and will draw every reasonable inference from such evidence. *Parini v. Lanch*, 148 M 188, 418 P 2d 861, 863.

#### Insufficient Evidence

A directed verdict may be granted when the evidence is so insufficient in fact as to be insufficient in law. *Parini v. Lanch*, 148 M 188, 418 P 2d 861, 863.

#### Motion by Both Parties

Owner of building destroyed by gas explosion was entitled to directed verdict against general contractor who was clearly liable on evidence, but not against gas company who should have been granted its motion for directed verdict on record unequivocally demonstrating that gas company took every reasonable precaution to protect customers as required by law. *Bridges v. Moritz*, 149 M 273, 425 P 2d 721.

#### Negligence

Directed verdict on liability of defend-



ant for injuries sustained by plaintiff, when defendant's car struck mare which was being led by rope attached to saddle on gelding upon which plaintiff was riding, was proper where negligence of defendant was shown by evidence that defendant had been drinking; that he was driving the car at 30-35 mph while passengers were hunting gophers beside the road; that defendant was not aware of the mare which he struck until the collision was inevitable; and that he failed to stop after realizing that he had struck horse in violation of section 32-1202. *Parini v. Lanch*, 148 M 188, 418 P 2d 861, 864.

### Questions of Fact

A jury question is presented only when reasonable men might differ as to the conclusions of fact to be drawn from the evidence, viewed in the light most favorable to the party against whom the motion is made. *Parini v. Lanch*, 148 M 188, 418 P 2d 861, 863.

Directed verdict upholding contested will was improper where, under the evidence, reasonable and fair-minded men

might have reached the conclusion that the will was invalid due to fraud, undue influence or lack of testamentary capacity. *Estate of Hall v. Milkovich*, 158 M 438, 492 P 2d 1388, distinguished in — M —, 515 P 2d 368.

### Review of Order Directing Verdict

In reviewing an order directing a verdict for the defendant, the supreme court would consider only the evidence of the plaintiff, excluding a bare scintilla but including every fair inference which might be drawn from the facts proved, as well as any evidence introduced by defendant which tended to support the plaintiff's case, and if the evidence viewed in the most favorable light tended to establish the case made by plaintiff's pleadings, the order would be reversed. *McIntosh v. Linder-Kind Lumber Co.*, 144 M 1, 393 P 2d 782.

### References

*Holland v. Konda*, 142 M 536, 385 P 2d 272; *Tolson v. Tolson*, 145 M 87, 399 P 2d 754.

## CHAPTER 53—TRIAL BY THE COURT

### 93-5302. (9366) Superseded—Supreme Court Order 10750-9.

#### Supersession

Section 93-5302 (Sec. 1111, C. Civ. Proc. 1895), requiring decision on findings upon question of fact to be in writing and filed

within twenty days after submission, was superseded by M. R. Civ. P., Rule 52(a), as amended by Sup. Ct. Ord. 10750-9.

### 93-5305 to 93-5307. (9369 to 9371) 10750-9.

#### Supersession

Sections 93-5305 to 93-5307 (Secs. 1114 to 1116, C. Civ. Proc. 1895), relating to exceptions for defective findings and to

### Superseded—Supreme Court Order

effect of want of findings, were superseded by M. R. Civ. P., Rule 52(b), as amended by Sup. Ct. Ord. 10750-9.

## CHAPTER 55—EXCEPTIONS—SETTLEMENT AND ALLOWANCE OF BILL

### 93-5501. (9386) Superseded—M. R. App. Civ. P.

#### Supersession

This section (Ap. p. Sec. 164, p. 75, Bannack Stat.), defining an exception and providing the time when the exception

must be taken, is listed as superseded in Table A of M. R. App. Civ. P. See M. R. Civ. P., Rule 46.

### 93-5503. (9388) Superseded—M. R. App. Civ. P.

#### Supersession

This section (Ap. p. Sec. 166, p. 76, Bannack Stat.; Sec. 1, Ch. 92, L. 1905; Sec. 2, Ch. 225, L. 1921), relating to ex-

ceptions and objections, is listed as superseded in Table A of M. R. App. Civ. P. See M. R. Civ. P., Rule 46.

**93-5504 to 93-5509. (9389 to 9394) Superseded—M. R. App. Civ. P., Rules 9, 10 and 25.**

**Supersession**

These sections (Secs. 1154 to 1158, C. Civ. Proc. 1895; Sec. 1, Ch. 35, L. 1907; Secs. 3, 4, Ch. 225, L. 1921; Sec. 1, Ch.

19, L. 1941; Sec. 1, Ch. 85, L. 1955), relating to the settlement and allowance of bill of exceptions, are superseded by M. R. App. Civ. P., Rules 9, 10 and 25.

**CHAPTER 56—NEW TRIALS—GROUNDS AND MOTIONS FOR—RECORD ON APPEAL FROM FINAL JUDGMENT**

**93-5601. (9395) New trial defined.**

**Parties Restored to Original Position**

The granting of a motion for a new trial restores the parties to the positions they occupied before the trial and the action is commenced anew with the par-

ties limited to their original pleadings but unbound by previous evidence and testimony except as held by existing rules of evidence. *Waite v. Waite*, 143 M 248, 389 P 2d 181.

**93-5602. (9396) New trial in equity cases.**

**Irregularity in Proceedings**

In an action for specific performance where plaintiff who had no knowledge of law or procedure acted as his own counsel and, though he received some assistance from the trial judge, many errors in

the proceedings were shown in the record, it was within the discretion of the judge to grant defendant's motion for a new trial. *Waite v. Waite*, 143 M 248, 389 P 2d 181.

**93-5603. (9397) When a new trial may be granted.**

**Abuse of Discretion**

Aggrieved party has burden of proving that district court manifestly abused its discretion by granting new trial; prima facie case of manifest abuse of discretion may be made by discrediting grounds specified for granting new trial or showing that existing error did not materially affect substantial rights of moving party. *Tigh v. College Park Realty Co.*, 149 M 358, 427 P 2d 57.

Where jury's verdict was based on conflicting and probably false testimony, refusal of new trial by trial court was sufficient abuse of discretion to require supreme court to reverse lower court and order new trial. *Morris v. Corcoran Pulpwood Co.*, 154 M 468, 465 P 2d 827.

**Accident or Surprise.**

Introduction in midtrial in negligence action against county for death of exhibitor's horses in barn fire of evidence tending to show that care, custody and control of horses was in county was not surprise creating ground for new trial because of county's representation by insurers' counsel where county had been warned by insurer almost two and a half years before trial that policy might not cover loss because of policy exclusion of property in care, custody and control of the insured; refusal to admit into evidence county's premium book containing rules and regulations applicable to ex-

hibitors as well as exculpatory disclaimers of liability for loss of exhibitor's livestock did not create surprise. *Haynes v. County of Missoula*, 163 M 270, 517 P 2d 370, 69 ALR 3d 1008.

**Appellate Review**

In condemnation proceeding, where state appraised land at \$18,000, condemnnee appraised it at \$95,000 and jury awarded condemnnee \$21,000, granting of new trial because award was inadequate was not such an abuse of trial judge's discretion as to warrant reversal in spite of fact that there was no rebuttal of state's only expert witness. *State Highway Commission v. Greenfield*, 145 M 164, 399 P 2d 989.

**Inadequate Damages**

The trial court had no power in a condemnation case to condition its denial of a new trial on acceptance by the highway commission of a higher award. *State Highway Commission v. Schmidt*, 143 M 505, 391 P 2d 692.

Court abused its discretion in granting new trial upon grounds of insufficiency of evidence to justify verdict in that "verdict awarded by the jury to the plaintiff is wholly inadequate" where there was conflict in evidence and where it was question for jury whether injuries suffered by passenger were caused by grossly negligent operation of car or whether passen-

ger assumed risk of going into car driven by man who had several drinks. *Heen v. Tidley*, 151 M 265, 442 P 2d 434.

Granting of new trial on ground that award of \$4,000 was inadequate damages for death of high school sophomore whose funeral expenses were \$1,605 was an abuse of discretion under the circumstances, including fact that plaintiff father received no earnings from son and gave no indication of need. *Davis v. Smith*, 152 M 170, 448 P 2d 133.

### Inadmissibility of Evidence

Although the plaintiff presented other evidence of negligence, the introduction of hearsay report showing slight malfunctioning of a ski lift was reversible error. *Pessl v. Bridger Bowl*, — M —, 524 P 2d 1101.

### Instructions to Jury

Long form quotient verdict instruction from Jury Instruction Guide is not "a resort to the determination of chance" within meaning of statute in absence of showing that jurors agreed in advance that quotient thus obtained should constitute amount of verdict and adhered to that agreement. *Thomas v. Whiteside*, 148 M 394, 421 P 2d 449.

Where trial court erred in its instruction on assumption of risk in pedestrian injury case, trial court did not abuse its discretion by granting new trial pursuant to this section. *Jankovich v. Neill*, 153 M 337, 457 P 2d 475.

### Insufficient Evidence

Plaintiff was not entitled to an easement by necessity where there was evidence of other possible routes and no evidence of necessity. *Wilson v. Chestnut*, — M —, 525 P 2d 24.

### Jury Misconduct

In a condemnation proceeding, affidavits from jurors showing that a newspaper cartoon having to do with condemnation cases in general had been viewed by some members of the jury during the trial could not be used to support the motion for a new trial in the absence of a showing that the verdict was reached in a manner other than by a fair expression of opinion by the jurors. *State Highway Commission v. Manry*, 143 M 382, 390 P 2d 97, distinguished in *Goff v. Kinzle*, 148 M 61, 417 P 2d 105, and in *Rasmussen v. Sibert*, 153 M 286, 456 P 2d 835.

New trial was properly granted where foreman of jury made his own investigation at the scene of the accident after hearing testimony and informed the other members of jury, during their deliberation, of the results of his investigation.

The foreman was guilty of misconduct upon which verdict could be impeached by affidavits of jurors. *Goff v. Kinzle*, 148 M 61, 417 P 2d 105, distinguished in *Rasmussen v. Sibert*, 153 M 286, 456 P 2d 835 and *Charlie v. Foos*, — M —, 503 P 2d 538.

Trial court did not err in denying plaintiff's motion for a new trial, on the ground of misconduct of the jury during its deliberations, supported by affidavits of four jurors indicating that the irregularity was not on a material matter in dispute, where plaintiff was probably not prejudiced by juror's misconduct in improperly referring to prior litigation in which plaintiff had been involved, the poll of the jury showing an eight to four verdict for the plaintiff. *Schmoyer v. Bourdeau*, 148 M 340, 420 P 2d 316, 317.

Trial court's granting of new trial on grounds of jury misconduct was reversible error where such motion was made under subd. 1 of this section and supported by jury affidavits, since use of jury affidavits under this section is confined to motions made under subd. 2. *Rasmussen v. Sibert*, 153 M 286, 456 P 2d 835.

### Negligence Verdict

The power company has no duty to supply an explanation for every fire that occurs on private property to which it supplies electricity, and where the company presented evidence from which reasonable men could conclude that it was free from negligence, this was sufficient to support jury verdict in favor of the power company. *Hash v. Montana Power Co.*, — M —, 524 P 2d 1092.

### Polling Jury

Court abused discretion in granting new trial based solely on ground that it had erred in refusing request for poll of jury; error, if any, was harmless in light of evidence affirmatively showing that verdict was rendered in open court in presence of all counsel, that in response to question by judge, foreman of jury advised him they had agreed upon verdict and that following reading of verdict, signed by foreman, judge inquired of jury if it was true verdict of at least eight of them and jury answered in affirmative. *Martello v. Darlow*, 151 M 232, 441 P 2d 175.

### Statement of Grounds

Rule 7(b)(1) of the Rules of Civil Procedure requires that a motion state the grounds with particularity, and it was error to grant a new trial based on a motion that merely recited the grounds in the words of subdivisions 1, 6 and 7 of this section without more particularity. *Halsey v. Uithof*, — M —, 532 P 2d 686.



**Substantial Evidence**

Although new trial for insufficiency of evidence is discretionary with trial court and will not be disturbed except for abuse, the discretion is exhausted when court finds substantial evidence to support verdict; evidence from which it could be found that drive-in restaurant owner had no reasonable cause to anticipate "spur of the moment" unprovoked assault upon patron supported verdict for owner in action for injuries, so that granting of new trial was abuse of discretion. *Kincheloe v. Rygg*, 152 M 187, 448 P 2d 140.

Verdict of \$30,000 for compensation for

land taken in condemnation action was supported by substantial evidence where two appraisers had valued the land at \$19,650 and \$22,873 respectively, plaintiff's expert valued the land at \$64,000 and plaintiff testified that his compensation should be \$78,000; trial court erred in granting new trial on ground that evidence was insufficient to justify the verdict. *State Highway Comm. v. Arms*, — M —, 518 P 2d 35.

**References**

*Waite v. Waite*, 143 M 248, 389 P 2d 181.

**93-5606. (9400) Superseded—Supreme Court Order 10750-9.****Supersession**

Section 93-5606 (Sec. 172, p. 77, Bannack Stat.; Sec. 3, Ch. 41, L. 1907; Sec. 8, Ch. 225, L. 1921), relating to hearing on new

trial motion, was superseded by M. R. Civ. P., Rule 59(d), as amended by Sup. Ct. Ord. 10750-9.

**93-5607, 93-5608. (9401, 9402) Superseded—M. R. App. Civ. P., Rules 7, 9, 10 and 25.****Supersession**

These sections (Ap. p. Sec. 289, p. 115, L. 1877; Ap. p. Secs. 1175, 1176, C. Civ. Proc. 1895; Sec. 4, Ch. 41, L. 1907; Sec. 9, Ch. 225, L. 1921), relating to a stay

of proceedings on notice of motion for a new trial and contents of record on appeal, are superseded by M. R. App. Civ. P., Rules 7, 9, 10 and 25.

**CHAPTER 57—JUDGMENT—MANNER OF GIVING AND ENTRY—JUDGMENT ROLL AND DOCKET—LIEN OF**

Section 93-5708. Judgment lien—when it begins and when it expires.

93-5710.1. Judgment or decree recorded before 1965 as notice of contents—certified copies as evidence.

93-5710.2. Judgment or decree recorded before 1967 as notice of contents—certified copies as evidence.

93-5710.3. Validation of defective judgments or decrees affecting realty—1969 act.

93-5710.4. Validation of defective judgments or decrees affecting realty—1971 act.

93-5710.5. Validation of defective judgments or decrees affecting realty—1973 act.

**93-5702. (9404) Superseded—M. R. App. Civ. P., Rule 29.****Supersession**

This section (Sec. 174, p. 77, Bannack Stat.), providing for bringing of a case before the court for argument where the

case has been reserved for argument, is superseded by M. R. App. Civ. P., Rule 29.

**93-5707. (9409) Superseded—M. R. App. Civ. P., Rules 9, 10 and 25.****Supersession**

This section (Ap. p. Sec. 203, p. 174, L. 1867; Sec. 1, Ch. 36, L. 1921; Sec. 1, Ch. 146, L. 1925), relating to the contents

and filing of judgment roll, is superseded by M. R. App. Civ. P., Rules 9, 10 and 25.

93-5708. (9410) Judgment lien—when it begins and when it expires. Immediately after the entry of the judgment in the judgment book, the

clerk must make the proper entries of the judgment, under appropriate heads, in the docket kept by him; and from the time the judgment is docketed it becomes a lien upon all real property of the judgment debtor not exempt from execution in the county, owned by him at the time, or which he may afterward acquire, until the lien ceases. The lien continues for six years, unless the judgment be previously satisfied.

**History:** Ap. p. Sec. 180, p. 78, Bannack Stat.; en. Sec. 204, p. 174, L. 1867; re-en. Sec. 244, p. 77, Cod. Stat. 1871; amd. Sec. 1, p. 40, L. 1876; re-en. Sec. 295, p. 116, L. 1877; re-en. Sec. 295, 1st Div. Rev. Stat. 1879; re-en. Sec. 307, 1st Div. Comp. Stat. 1887; re-en. Sec. 1197, C. Civ. Proc. 1895; re-en. Sec. 6807, Rev. C. 1907; re-en. Sec. 9410, R. C. M. 1921; amd. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. January 1, 1966. Cal. C. Civ. Proc. Sec. 671.

#### **Advisory Committee's Note**

Subdivision (b) of Rule 41, M. R. App. Civ. P., eliminates the reference in section 93-5708 to judgment rolls, which are nowhere provided for in Montana Rules of Appellate Civil Procedure.

#### **Amendments**

The 1965 amendment substituted "the entry of the judgment in the judgment book" for "after filing the judgment roll" near the beginning of the section.

**93-5710.1. Judgment or decree recorded before 1965 as notice of contents—certified copies as evidence.** Any judgment or decree of any court of this state affecting real property, provided that no action is now pending to set aside any such judgment or decree, which was, previous to the date this act takes effect, copied into the proper book, kept in the office of the clerk of the district court, and certified copy of which judgment or decree was, previous to the date this act takes effect, recorded in the proper book, kept in the office of the county clerk and recorder, shall be deemed to impart, after that date, notice of its contents to subsequent purchasers and encumbrancers, notwithstanding any defect, omission, informality or irregularity in any of the court proceedings in the action in which such judgment or decree was entered and obtained, if time for appeal in the case has expired, and such judgment or decree shall not be deemed invalidated by reason of any such defect, omission, informality or irregularity; but nothing herein shall be deemed to affect the rights of purchasers or encumbrancers previous to that date. Duly certified copies of such judgment or decree, or of the record thereof, may be read in evidence, with like effect as copies of a judgment or decree duly and regularly obtained and recorded and entered.

**History:** En. Sec. 1, Ch. 124, L. 1965.

#### **Title of Act**

An act to validate records of court proceedings containing defects, omissions, informalities or irregularities in obtaining a judgment or decree affecting real property, in which time for appeal has expired; providing that duly certified copies of such judgment or decree may

be read in evidence with the same effect as judgments or decrees duly and regularly obtained, recorded and entered; and providing for a repealing clause.

#### **Repealing Clause**

Section 2 of Ch. 124, Laws 1965 repealed all acts and parts of acts in conflict therewith.

**93-5710.2. Judgment or decree recorded before 1967 as notice of contents—certified copies as evidence.** Any judgment or decree of any court of this state affecting real property, provided that no action is now pending to set aside any such judgment or decree, which was, prior to January 1, 1967, copied into the proper book, kept in the office of the clerk of the

district court, and certified copy of which judgment or decree was, previous to the date this act takes effect, recorded in the proper book, kept in the office of the county clerk and recorder, shall be deemed to impart, after that date, notice of its contents to subsequent purchasers and encumbrancers, notwithstanding any defect, omission, informality or irregularity in any of the court proceedings in the action in which such judgment or decree was entered and obtained, if time for appeal in the case has expired, and such judgment or decree shall not be deemed invalidated by reason of any such defect, omission, informality or irregularity; but nothing herein shall be deemed to affect the rights of purchasers or encumbrancers previous to that date. Duly certified copies of such judgment or decree, or of the record thereof, may be read in evidence, with like effect as copies of a judgment or decree duly and regularly obtained and recorded and entered.

**History:** En. Sec. 1, Ch. 184, L. 1967.

**Title of Act**

An act to validate records of court proceedings prior to January 1, 1967, containing defects, omissions, informalities or irregularities in obtaining a judgment

or decree affecting real property, in which time for appeal has expired; providing that duly certified copies of such judgment or decree may be read in evidence with the same effect as judgments or decrees duly and regularly obtained, recorded and entered.

**93-5710.3. Validation of defective judgments or decrees affecting realty—1969 act.** Any judgment or decree of any court of this state affecting real property, provided that no action is now pending to set aside any such judgment or decree, which was, prior to January 1, 1969, copied into the proper book, kept in the office of the clerk of the district court, and certified copy of which judgment or decree was, previous to the date this act takes effect, recorded in the proper book, kept in the office of the county clerk and recorder, shall be deemed to impart, after that date, notice of its contents to subsequent purchasers and encumbrancers, notwithstanding any defect, omission, informality or irregularity in any of the court proceedings in the action in which such judgment or decree was entered and obtained, if time for appeal in the case has expired, and such judgment or decree shall not be deemed invalidated by reason of any such defect, omission, informality or irregularity; but nothing herein shall be deemed to affect the rights of purchasers or encumbrancers previous to that date. Duly certified copies of such judgment or decree, or of the record thereof, may be read in evidence, with like effect as copies of a judgment or decree duly and regularly obtained and recorded and entered.

**History:** En. Sec. 1, Ch. 73, L. 1969.

**Compiler's Notes**

This act became effective July 1, 1969.

**Title of Act**

An act to validate records of court proceedings prior to January 1, 1969, containing defects, omissions, informalities or ir-

regularities in obtaining a judgment or decree affecting real property, in which time for appeal has expired; providing that duly certified copies of such judgment or decree may be read in evidence with the same effect as judgments or decrees duly and regularly obtained, recorded and entered.

**93-5710.4. Validation of defective judgments or decrees affecting realty—1971 act.** Any judgment or decree of any court of this state



affecting real property, provided that no action is now pending to set aside any such judgment or decree, which was, prior to January 1, 1971, copied into the proper book, kept in the office of the clerk of the district court, and certified copy of which judgment or decree was, previous to the date this act takes effect, recorded in the proper book, kept in the office of the county clerk and recorder, shall be deemed to impart, after that date, notice of its contents to subsequent purchasers and encumbrancers, notwithstanding any defect, omission, informality or irregularity in any of the court proceedings in the action in which such judgment or decree was entered and obtained, if time for appeal in the case has expired, and such judgment or decree shall not be deemed invalidated by reason of any such defect, omission, informality or irregularity; but nothing herein shall be deemed to affect the rights of purchasers or encumbrancers previous to that date. Duly certified copies of such judgment or decree, or of the record thereof, may be read in evidence, with like effect as copies of a judgment or decree duly and regularly obtained and recorded and entered.

**History:** En. Sec. 1, Ch. 94, L. 1971.

**Title of Act.**

An act to validate records of court proceedings prior to January 1, 1971, containing defects, omissions, informalities or irregularities in obtaining a judgment or

decree affecting real property, in which time for appeal has expired; providing that duly certified copies of such judgment or decree may be read in evidence with the same effect as judgments or decrees duly and regularly obtained, recorded and entered.

**93-5710.5. Validation of defective judgments or decrees affecting realty —1973 act.** Any judgment or decree of any court of this state affecting real property, provided that no action is now pending to set aside any such judgment or decree, which was, prior to January 1, 1973, copied into the proper book, kept in the office of the clerk of the district court, and certified copy of which judgment or decree was, previous to the date this act takes effect, recorded in the proper book, kept in the office of the county clerk and recorder, shall be deemed to impart, after that date, notice of its contents to subsequent purchasers and encumbrancers, notwithstanding any defect, omission, informality or irregularity in any of the court proceedings in the action in which such judgment or decree was entered and obtained, if time for appeal in the case has expired, and such judgment or decree shall not be deemed invalidated by reason of any such defect, omission, informality or irregularity; but nothing herein shall be deemed to affect the rights of purchasers or encumbrancers previous to that date. Duly certified copies of such judgment or decree, or of the record thereof, may be read in evidence, with like effect as copies of a judgment or decree duly and regularly obtained and recorded and entered.

**History:** En. Sec. 1, Ch. 146, L. 1973.

**Title of Act**

An act to validate records of court proceedings prior to January 1, 1973, containing defects, omissions, informalities or irregularities in obtaining a judgment or

decree affecting real property, in which time for appeal has expired; providing that duly certified copies of such judgment or decree may be read in evidence with the same effect as judgments or decrees duly and regularly obtained, recorded and entered.

## CHAPTER 58—THE EXECUTION

## Section 93-5813.1. Waiver of exemptions prohibited in unsecured note.

93-5834. Real property sold—how redeemed—who are redemptioners.

93-5836. Redemptioners' rights—manner of redeeming—when purchaser entitled to deed—certificate of redemption—redemption by stockholders—redeeming from spouse.

93-5846. Validation of judicial sales before 1973.

## 93-5805. (9420) Money judgments and others—how enforced.

**Execution in Excess of Judgment**

Where writ of execution was issued to enforce a judgment, the fact that the levy of \$23,610.25 was allegedly \$5000 in excess of the amount owed by the debtor did not

provide grounds for a motion to quash the writ; the proper remedy would have been to move to set aside the excess. *Heller v. Osburnsen*, — M —, 548 P 2d 607.

93-5813.1. Waiver of exemptions prohibited in unsecured note. Any waiver of statutory exemption from execution in an unsecured promissory note shall be unenforceable.

History: En. Sec. 1, Ch. 172, L. 1965.

**Title of Act**

An act to prohibit waiver of statutory exemptions.

## 93-5816. (9429) Exemption of earnings—debts incurred for necessities.

**Proceeding in Federal Court**

By virtue of the provisions of the Federal Rules of Civil Procedure, Rule 69(a), this section, and not 15 U.S.C. §1673, governed whether a judgment creditor could levy execution on the wages of its debtor in an action brought in federal court. *United States v. Dumont*, 416 F Supp 632.

**Waiver of Exemption**

General waiver of statutory exemption in secured promissory note was not enforceable as against divorcee working to provide the necessities for herself and her children; a levy of execution could not be had on her wages. *Anaconda Federal Credit Union, #4401 v. West*, 157 M 175, 483 P 2d 909.

## 93-5824. (9432) Notice of sale—how given—copy of notice.

**Sale of Real Property**

District court ordering the restraining of a sale of real property on execution can determine if additional notice is required after the injunction is lifted if

the initial notice requirements of this section have been met. *Williams v. Superior Homes, Inc.*, 148 M 38, 417 P 2d 92, 95.

93-5834. (9442) Real property sold—how redeemed—who are redemptioners. Property sold subject to redemption, as provided by the last section, or any part sold separately, may be redeemed in the manner hereinafter provided, by the following persons, or their successors in interest:

1. The judgment debtor, the judgment debtor's spouse, or his successor in interest, in the whole or any part of the property, and if the judgment debtor or successor be a corporation, then by a stockholder thereof;

2. \* \* \* [Same as parent volume.]

History: En. Sec. 230, p. 181, L. 1867; re-en. Sec. 280, p. 87, Cod. Stat. 1871; re-en. Sec. 330, p. 129, L. 1877; re-en. Sec. 330, 1st Div. Rev. Stat. 1879; re-en. Sec. 341, 1st Div. Comp. Stat. 1887; amd. Sec. 1234, C. Civ. Proc. 1895; re-en. Sec. 6837,

Rev. C. 1907; amd. Sec. 1, Ch. 107, L. 1913; re-en. Sec. 9442, R. C. M. 1921; amd. Sec. 1, Ch. 16, L. 1927; amd. Sec. 55, Ch. 535, L. 1975. Cal. C. Civ. Proc. Sec. 701.

**Amendments**

The 1975 amendment substituted "the judgment debtor's spouse" for "his wife" in subdivision 1.

**Right of Redemption**

The right of redemption is a purely statutory one exercisable only within the

time and under the conditions specified by the statutes; it is not property in any sense, but a bare personal privilege; a person from whom statutory redemption is sought cannot impose any conditions upon the redemptioner not imposed by statute. *Lester v. J. & S. Investment Co.*, — M —, 557 P 2d 299.

**93-5836. (9444) Redemptioners' rights—manner of redeeming—when purchaser entitled to deed—certificate of redemption—redemption by stockholders—redeeming from spouse. (1) \* \* \*** [Same as parent volume.]

(2) Written notice of redemption must be given to the sheriff, and a duplicate filed with the county clerk, and if any taxes or assessments are paid by the redemptioner, or if he has or acquired any liens other than that upon which the redemption was made, notice thereof must in like manner be given to the sheriff and filed with the county clerk; and if such notice be not filed, the property may be redeemed without paying such tax, assessments, or lien. If no redemption be made within one year after the sale, the purchaser, or his assignee, is entitled to a conveyance; or, if so redeemed, whenever sixty (60) days have elapsed, and no other redemption has been made, and notice thereof given, and the time for redemption has expired, the last redemptioner, or his assignee, is entitled to a sheriff's deed; but in all cases, the judgment debtor shall have the entire period of one year from the date of the sale to redeem the property. If the judgment debtor or the judgment debtor's spouse redeem, the judgment debtor or the spouse must make the same payments as are required to effect a redemption by a redemptioner. If the debtor redeem, the effect of the sale is terminated, and the debtor is restored to his own estate. If the spouse redeem, such spouse shall become the owner of the debtor spouse's interest, subject to any liens thereon at the time of the execution sale. Upon a redemption by a debtor, or the debtor's spouse, the person to whom the payment was made must execute and deliver to him or her a certificate of redemption, acknowledged or proved before an officer authorized to take acknowledgments of conveyances of real property. Such certificate must be filed and recorded in the office of the county clerk of the county in which the property is situated, and the county clerk must note the record thereof in the margin of the record of the certificate of sale.

(3) \* \* \* [Same as parent volume.]

(4) If the spouse of a judgment debtor redeem, the judgment debtor, within one year after the date of sale, may redeem by paying the spouse or the spouse's successors in interest or the sheriff for the benefit of the spouse or the successors in interest of the spouse, the amount paid to effect the redemption, with interest thereon at the rate of one-half of one per cent ( $\frac{1}{2}\%$ ) per month from the date of redemption until the date of such payment, together with any taxes or assessments that may have been paid by the spouse or the successors in interest of the spouse, with like interest thereon.

History: Ap. p. Sec. 232, p. 182, L. 1871; amd. Sec. 332, p. 129, L. 1877; 1867; re-en. Sec. 282, p. 88, Cod. Stat. re-en. Sec. 332, 1st Div. Rev. Stat. 1879;



re-en. Sec. 343, 1st Div. Comp. Stat. 1887; amd. Sec. 1236, C. Civ. Proc. 1895; re-en. Sec. 6839, Rev. C. 1907; en. Sec. 2, Ch. 107, L. 1913; re-en Sec. 9444, R. C. M. 1921; amd. Sec. 2, Ch. 16, L. 1927; amd. Sec. 2, Ch. 103, L. 1937; amd. Sec. 56, Ch. 535, L. 1975. Cal. C. Civ. Proc. Sec. 703.

#### Amendments

The 1975 amendment substituted "the

judgment debtor's spouse" or "the spouse" for references to the wife throughout the section; substituted "the debtor spouse's interest" for "her husband's interest" throughout the section; substituted "judgment debtor" or "debtor" for "the husband" or "he" throughout the section; and made minor changes in phraseology.

### 93-5840. (9448) Who entitled to rents and profits.

#### Management Fee

The purchasers of an apartment building were not entitled to offset a "management fee" against rents and profits in

computing the balance due for redemption of the property. *Lester v. J. & S. Investment Co.*, — M —, 557 P 2d 299.

### 93-5841. (9449) Possession of lands prior to foreclosure, etc.

#### Vendee of Mortgagee

Purchasers who took premises subject to pre-existing mortgage, and who had not assumed payment of mortgage, even though occupying premises as their home at time of foreclosure, were not "execu-

tion debtors" within meaning of statute and were not entitled to possession of premises during one-year period of redemption. *First Nat. Bank of Circle v. Hastetter*, 149 M 142, 423 P 2d 306.

### 93-5843. (9451) Party who pays more than his share, etc.

#### Indemnity Denied

Jury verdict, finding that driver was grossly negligent, precluded insurer of driver from receiving indemnity from auto manufacturer, even though jury had

also made a determination that the auto manufacturer was liable for negligent manufacture and design of auto. *Automobile Club Ins. Co. v. Toyota Motor Sales, Inc.*, — M —, 531 P 2d 1337.

**93-5846. Validation of judicial sales before 1973.** All judicial sales of real property prior to January 1, 1973, provided no action is now pending to set such sale aside, where made in this state on proceedings to satisfy valid judgments or decrees of any court and the moneys bidden thereon paid to the officer making such sale, shall be valid and sufficient in law to sustain a sheriff's deed based on such sale, and when no such deed has been executed, shall entitle such purchaser to such deed; and such deed, if now or when executed, shall be sufficient to convey all the title of judgment debtor at the time of such sale in the premises so sold to the purchaser at said sale, and all defects or irregularities in the issuance of execution, or the manner of making or conducting the sale, or in the recitals or references in such deed, shall be disregarded and such sale shall not be invalidated by reason of any such defect or irregularity.

**History:** En. Sec. 1, Ch. 80, L. 1973.

#### Compiler's Notes

Except for the date in the second line of text, the above section is identical with Sec. 1, Ch. 57, Laws of 1965, Sec. 1, Ch. 180, Laws of 1967, Sec. 1, Ch. 76, Laws of 1969 and Sec. 1, Ch. 97, Laws of 1971, previously compiled at this section. The compiler has therefore substituted the above section for the 1971 section.

#### Title of Act

An act relating to validation of judicial sales prior to January 1, 1973, of real property and curing defects or irregularities in the issuance of execution, manner of making or conducting the sale, or in the recitals or references in sheriffs' deeds.

CHAPTER 60—FORECLOSURE OF MORTGAGES—ACTIONS FOR—  
SALES UNDER POWERS

## 93-6001. (9467) Proceedings in foreclosure suits.

**Deficiency Judgment**

The purpose of this section is to require the mortgagee to bring one foreclosure action to enforce "any right" protected by the mortgage. If the price bid in at foreclosure is insufficient to reimburse the mortgagee, a deficiency judgment may be entered against the mortgagor for the balance due and may be enforced by a lien upon the real property of the mortgagor only. *Stallings v. Erwin*, 148 M 227, 419 P 2d 480, 482.

**Tax Lien**

Where, subsequent to purchase of tax

certificates, mortgagee foreclosed the mortgage, the foreclosure sale cut off any lien asserted by mortgagee for taxes paid although the mortgage permitted mortgagee to pay taxes and collect the same upon foreclosure. *Stallings v. Erwin*, 148 M 227, 419 P 2d 480, 483.

A mortgagee who pays taxes on the mortgaged property prior to foreclosure does not acquire a distinct and separate lien on the property which survives the foreclosure sale. *Stallings v. Erwin*, 148 M 227, 419 P 2d 480, 483.

CHAPTER 61—NUISANCE, WASTE AND TRESPASS ON REAL  
PROPERTY—ACTIONS FOR

## 93-6101. (9474) Nuisance defined and actions for.

**Baseball Park**

"Pee wee" baseball league conducted on empty lot in residential district was not nuisance under statute, notwithstanding evidence that: field was brightly illuminated, crowds were noisy, traffic was heavy, field was dusty, some children used foul language, balls were hit into neighboring yards damaging lawns and flowers

and games were played after 10 p.m.; nuisance, if any, was private and arose out of particular manner of operation of legitimate enterprise lower court should merely have entered decree calculated to eliminate injurious features. *Kasala v. Kalispell Pee Wee Baseball League*, 151 M 109, 439 P 2d 65, 32 ALR 3d 1120.

CHAPTER 62—QUIETING TITLE TO PROPERTY, REAL AND PERSONAL  
AND OTHER ACTIONS CONCERNING REAL ESTATE

## 93-6203. (9479) Actions to quiet title to real property—parties—venue.

**After-acquired Interest**

Since the filing of a quiet title action freezes the respective rights of the parties, summary judgment was proper against plaintiff whose claim to title consisted

of tax certificates which had been assigned to him two weeks after commencement of the action. *Alden v. Johnson*, — M —, 535 P 2d 168.

## 93-6216. (9492) An order may be made to allow a party to survey, etc.

**References**

State ex rel. State Highway Commis-

sion v. District Court, 147 M 348, 412 P 2d 832.

## 93-6218. (9494) Petition for order—procedure.

**References**

State ex rel. State Highway Commis-

sion v. District Court, 147 M 348, 412 P 2d 832.

## CHAPTER 63—PARTITION OF REAL ESTATE—ACTIONS FOR

## 93-6301. (9516) Who may bring actions for partition.

**Separate Owners of Land and Building**

Where land and building on land had separate owners, owner of building had

no right to an order that the land and building be sold together and the proceeds apportioned between the owners, because

the owners were not cotenants of the whole property but sole owners of parts of the property. *Allman v. Stuart*, 158 M 402, 492 P 2d 909.

### 93-6311. (9526) Title of parties may be tried.

#### Compiler's Notes

Sections 93-3101 to 93-3103, 93-3201 to 93-3203, 93-3301 to 93-3306, 93-3401, 93-3402, 93-3404, 93-3405, 93-3408, 93-3410 to 93-3412, 93-3415, 93-3501 to 93-3506, 93-3601 to 93-3604, 93-3701, 93-3801 to 93-3803, 93-

3806 to 93-3808, 93-3811 to 93-3813, 93-3815 to 93-3820, 93-3901 to 93-3905, 93-3907, and 93-3909, contained in the reference to sections 93-3101 to 93-3910 in this section in the parent volume, were repealed by Sec. 84, Ch. 13, Laws 1961.

### 93-6352 to 93-6354. (9567 to 9569) Repealed.

#### Repeal

Sections 93-6352 to 93-6354 (Secs. 1391 to 1393, C. Civ. Proc. 1895), relating to

the sale or release of dower interests, were repealed by Sec. 15, Ch. 263, Laws 1975.

## CHAPTER 64—QUO WARRANTO

### 93-6405. (9580) When private person may commence action.

#### Unqualified Appointee

Taxpayer was not entitled to an injunction in action questioning the qualifications of supervisor appointed by board

of railway commissioners in proper exercise of their discretion. *Steel v. Board of Railroad Commrs.*, 144 M 432, 397 P 2d 101.

## CHAPTER 66—JUSTICES' COURTS—PLACE OF TRIAL OF ACTIONS

Section 93-6601. Where actions must be commenced.

93-6602. Place of trial may be changed in certain cases.

93-6601. (9619) Where actions must be commenced. Actions in justices' courts may be commenced, and, subject to the right to change the place of trial, as in this chapter provided, may be tried:

1. When the defendant, or all the defendants, if there be more than one, reside in another county than that in which the right of action accrues, and the action be for the recovery of personal property, or the value thereof, or damages for taking or detaining the same; in the county in which the property, or any part thereof, may be found, or in which the property, or any part thereof, was taken, or in which the defendant or either of the defendants reside;

2. When the defendant, or all of the defendants, if there be more than one, reside in another county than that in which the right of action accrues, and the action be for damages for violation of an express or implied contract, or for money due on an express or implied contract, debt, note, or account; in the county in which such contract or obligation is to be or was to have been performed, or such money is to be or was to have been paid, or in which the defendant or either of the defendants resides; and the county in which the obligation is incurred shall be deemed to be the county in which it is to be performed or paid, unless there is a special contract to the contrary;

3. When the defendant, or all of the defendants, if there be more than one, reside in another county than that in which the right of action accrues, and the action be for damages for injury to person, property, or



reputation; in the county where the injury was committed, or in which the defendant or either of the defendants reside;

4. When the defendant is a nonresident of the county; in any county where he may be found and served with summons personally;

5. When the defendant is a nonresident of the state; in any county of the state;

6. When the parties voluntarily appear and plead, without summons; in any county of the state;

7. In all other cases; in any county in which the defendant, or any one of the defendants, if there be more than one, reside, or may be found and served with summons personally.

History: En. Sec. 1480, C. Civ. Proc. 1895; amd. Sec. 1, p. 148, L. 1899; re-en. Sec. 6986, Rev. C. 1907; re-en. Sec. 9619, R. C. M. 1921; amd. Sec. 15, Ch. 491, L. 1973. Cal. C. Civ. Proc. Sec. 832.

#### Amendments

The 1973 amendment deleted "any township of" before references to the county in paragraphs 1 to 4 and 7; substituted "county" for "township" in paragraphs 5 and 6; and made minor changes in phraseology.

93-6602. (9620) Place of trial may be changed in certain cases. The court may, at any time before trial, on motion, change the place of trial in the following cases:

1. \* \* \* [Same as parent volume.]

2. Superseded by Supreme Court Rule, 34 State Reporter 26.

3. When a jury has been demanded, and either party makes and files an affidavit that he cannot have a fair and impartial trial, on account of the bias or prejudice of the citizens of the county, town, or city against him.

4. and 5. \* \* \* [Same as parent volume.]

History: Ap. p. Sec. 594, p. 160, Ban-nack Stat.; re-en. Sec. 700, p. 176, Cod. Stat. 1871; re-en. Sec. 760, 1st Div. Rev. Stat. 1879; re-en. Sec. 780, 1st Div. Comp. Stat. 1887; en. Sec. 1481, C. Civ. Proc. 1895; re-en. Sec. 6987, Rev. C. 1907; re-en. Sec. 9620, R. C. M. 1921; amd. Sec. 15, Ch. 491, L. 1973. Cal. C. Civ. Proc. Sec. 833.

avitt of interest, prejudice, or bias of a justice, is superseded by Supreme Court Rule, 34 State Reporter 26. The Rule is printed in a note following section 93-901.

#### Amendments

The 1973 amendment substituted "county" for "township" near the end of paragraph 3.

#### Supersession

Subsection 2, relating to filing an affi-

### CHAPTER 67—JUSTICES' COURTS—MANNER OF COMMENCING ACTIONS IN

Section 93-6706. Summons—how issued, directed and what to contain.

93-6711. Service of summons.

93-6706. (9631) Summons—how issued, directed and what to contain. The summons must be directed to the defendant and signed by the justice, and must contain:

1. The title of the court, the name of the county and city in which the action is commenced, and the names of the parties thereto;

2. and 3. \* \* \* [Same as parent volume.]

History: Ap. p. Sec. 556, p. 152, Ban-nack Stat.; re-en. Sec. 662, p. 169, Cod. Stat. 1871; re-en. Sec. 722, 1st Div. Rev. Stat. 1879; re-en. Sec. 742, 1st Div. Comp. Stat. 1887; en. Sec. 1505, C. Civ. Proc. 1895; re-en. Sec. 6998, Rev. C. 1907; re-en. Sec. 9631, R. C. M. 1921; amd. Sec. 1,

Ch. 91, L. 1939; amd. Sec. 17, Ch. 491, L. 1973. Cal. C. Civ. Proc. Sec. 884.

#### Amendments

The 1973 amendment deleted "or town-ship" following "name of the county and city" in paragraph 1.

**93-6711. (9636) Service of summons.** The summons may be served by a sheriff or constable of any of the counties of this state; provided, that when a summons issued by a justice of the peace is to be served out of the county in which it was issued, the summons shall have attached to it a certificate under seal by the county clerk of the county in which it was issued, to the effect that the person issuing the same was an acting justice of the peace at the date of the summons; or the summons may be served by any person resident in the state, eighteen (18) years of age or older, not a party to the suit, and must be served and returned as provided in Montana Rules of Civil Procedure, Rule 4D (2), (3), (4), (8), and (9); or it may be served by publication, provided in Montana Rules of Civil Procedure, Rule 4D (5) and (8), so far as they relate to publication of summons, are made applicable to justices' courts; the word "justice" being substituted for the word "clerk" whenever the latter word occurs.

History: En. Sec. 1510, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 61, L. 1903; re-en. Sec. 7003, Rev. C. 1907; re-en. Sec. 9636, R. C. M. 1921; amd. Sec. 1, Ch. 110, L. 1967; amd. Sec. 57, Ch. 535, L. 1975. Cal. C. Civ. Proc. Sec. 849.

#### Amendments

The 1967 amendment substituted "Montana Rules of Civil Procedure, Rule 4D (2), (3), (4), (8), and (9)" for "sections

93-3006 and 93-3007" after "as provided in"; and substituted "provided in Montana Rules of Civil Procedure, Rule 4D (5) and (8)" for "and sections 93-3013, 93-3014 and 93-3015" after "by publication."

The 1975 amendment deleted "male" before "person resident in the state"; and substituted "eighteen (18) years of age or older" for "over the age of eighteen (18) years."

### CHAPTER 68—JUSTICES' COURTS—PLEADINGS IN

**Section 93-6802.1. Permissible pleadings enumerated.**

93-6802.2. Demurrers abolished.

93-6811. Answer to amended pleadings.

**93-6802. (9639) Repealed.**

#### Repeal

Section 93-6802 (Sec. 1521, C. Civ. Proc. 1895), relating to the pleadings in justices'

courts, was repealed by Sec. 21, Ch. 420, Laws 1975.

**93-6802.1. Permissible pleadings enumerated.** In justice court there shall be a complaint and answer; and there shall be a reply to a counter-claim denominated as such; and an answer to a cross-claim; a third-party complaint, if a person who is not an original party is brought into the action; and there shall be a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

History: En. Sec. 1, Ch. 168, L. 1967.

allowed in justice court and designating the form thereof.

#### Title of Act

An act designating the pleadings to be

**93-6802.2. Demurrers abolished.** Demurrers and exceptions for insufficiency of a pleading shall not be used.

**History:** En. Sec. 2, Ch. 168, L. 1967; amd. Sec. 16, Ch. 420, L. 1975.

**Amendments**

The 1975 amendment deleted "pleas" after "Demurrers."

**Repealing Clause**

Section 3 of Ch. 168, Laws 1967 repealed all acts and parts of acts in conflict therewith.

**93-6804. (9641) Repealed.**

**Repeal**

Section 93-6804 (Sec. 1523, C. Civ. Proc. 1895), relating to timeliness of a demurrer

to a complaint, was repealed by Sec. 21, Ch. 420, Laws 1975.

**93-6807, 93-6808. (9644, 9645) Repealed.**

**Repeal**

Sections 93-6807, 93-6808 (Secs. 1526, 1527, C. Civ. Proc. 1895), relating to

demurrers to answers, and proceedings upon demurrer, were repealed by Sec. 21, Ch. 420, Laws 1975.

**93-6811. (9648) Answer to amended pleadings.** When a pleading is amended, the adverse party may answer it within such time, not exceeding two days, as the court may allow.

**History:** Earlier acts were Sec. 592, p. 159, Bannack Stat.; re-en. Sec. 698, p. 175, Cod. Stat. 1871; re-en. Sec. 758, 1st Div. Rev. Stat. 1879; re-en. Sec. 778, 1st Div. Comp. Stat. 1887.

This section en. Sec. 1530, C. Civ. Proc. 1895; re-en. Sec. 7015, Rev. C. 1907; re-

en. Sec. 9648, R. C. M. 1921; amd. Sec. 15, Ch. 420, L. 1975. Cal. C. Civ. Proc. Sec. 860.

**Amendments**

The 1975 amendment deleted "or demur to" after "may answer."

**CHAPTER 69—JUSTICES' COURTS—PROVISIONAL REMEDIES—ARREST IN CIVIL ACTIONS—ATTACHMENT—CLAIM AND DELIVERY**

Section 93-6903. A defendant arrested must be taken before the justice immediately.  
93-6908. Writ of attachment may issue upon affidavit.

**93-6903. (9654) A defendant arrested must be taken before the justice immediately.** The defendant, immediately upon being arrested, must be taken to the office of the justice who made the order, and if he is absent or unable to try the action, or if it appears to him by the affidavit of defendant that he is a material witness in the action, the officer must immediately take the defendant before another justice of the county, if there is another, and if not, then before a justice of an adjoining county, who must take jurisdiction of the action, and proceed thereon as if the summons had been issued and the order of arrest made by him.

**History:** En. Sec. 562, p. 154, Bannack Stat.; re-en. Sec. 668, p. 171, Cod. Stat. 1871; re-en. Sec. 728, 1st Div. Rev. Stat. 1879; re-en. Sec. 748, 1st Div. Comp. Stat. 1887; amd. Sec. 1542, C. Civ. Proc. 1895; re-en. Sec. 7021, Rev. C. 1907; re-en. Sec. 9654, R. C. M. 1921; amd. Sec. 18, Ch. 491, L. 1973. Cal. C. Civ. Proc. Sec. 863.

**Amendments**

The 1973 amendment substituted "county" for "town, township, or city" in the middle of the section; and substituted "adjoining county" for "adjoining township" near the end of the section.

**93-6908. (9659) Writ of attachment may issue upon affidavit.** A writ to attach the property of the defendant may be issued by the justice at



the time of, or after issuing summons and before answer, on receiving an affidavit by or on behalf of the plaintiff, showing the same facts as are required to be shown by the affidavit specified in 93-4302.1.

**History:** En. Sec. 568, p. 155, Bannack Stat.; re-en. Sec. 674, p. 172, Cod. Stat. 1871; re-en. Sec. 734, 1st Div. Rev. Stat. 1879; re-en. Sec. 754, 1st Div. Comp. Stat. 1887; amd. Sec. 1560, C. Civ. Proc. 1895; re-en. Sec. 7026, Rev. C. 1907; re-en. Sec. 9659, R. C. M. 1921; amd. Sec. 6, Ch. 299, L. 1977. Cal. C. Civ. Proc. Sec. 866.

#### Amendments

The 1977 amendment substituted "may" for "must"; and substituted "93-4302.1" for "section 93-4302".

#### Repealing Clause

Section 7 of Ch. 299, Laws 1977 read "Section 93-4302, R. C. M. 1947, is repealed."

### CHAPTER 73—JUSTICES' COURTS—JUDGMENT IN

Section 93-7302. Judgment of dismissal entered in certain cases without prejudice.  
93-7311. Abstract of judgment.

**93-7302. (9680) Judgment of dismissal entered in certain cases without prejudice.** Judgment that the action be dismissed without prejudice to a new action, may be entered with costs in the following cases:

1. to 3. \* \* \* [Same as parent volume.]

4. When it is objected at the trial, and appears by the evidence, that the action is brought in the wrong county; but if the objection is taken and overruled, it is the cause of a reversal on appeal, and does not otherwise invalidate the judgment; if not taken at the trial, it is waived.

**History:** En. Sec. 605, p. 163, Bannack Stat.; re-en. Sec. 711, p. 179, Cod. Stat. 1871; re-en. Sec. 771, 1st Div. Rev. Stat. 1879; re-en. Sec. 791, 1st Div. Comp. Stat. 1887; amd. Sec. 1621, C. Civ. Proc. 1895; re-en. Sec. 7047, Rev. C. 1907; re-en. Sec. 9680, R. C. M. 1921; amd. Sec. 2, Ch. 34,

L. 1937; amd. Sec. 19, Ch. 491, L. 1973. Cal. C. Civ. Proc. Sec. 890.

#### Amendments

The 1973 amendment deleted "or township, town, or city" immediately preceding the first semicolon in paragraph 4.

**93-7311. (9689) Abstract of judgment.** The justice, on the demand of a party in whose favor judgment is rendered, must give him an abstract of the judgment in substantially the following form (filling blanks according to the facts):

"State of Montana

County of \_\_\_\_\_

\_\_\_\_\_, plaintiff, v. \_\_\_\_\_, defendant.

In justice's court, before \_\_\_\_\_, justice of the peace, \_\_\_\_\_ county, \_\_\_\_\_, 19\_\_ (inserting date of abstract). Judgment entered for plaintiff (or defendant) for \$\_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_. I certify that the foregoing is a correct abstract of a judgment rendered in said action in my court, or (as the case may be) in the court of \_\_\_\_\_, justice of the peace, as it appears by his docket, now in my possession, as his successor in office.

\_\_\_\_\_, Justice of the Peace.

**History:** Ap. p. Sec. 614, p. 164, Bannack Stat.; re-en. Sec. 720, p. 180, Cod. Stat. 1871; amd. Sec. 1, p. 38, L. 1876;

re-en. Sec. 780, p. 184, 1st Div. Rev. Stat. 1879; re-en. Sec. 800, 1st Div. Comp. Stat. 1887; en. Sec. 1630, C. Civ. Proc. 1895;

re-en. Sec. 7056 Rev. C. 1907; re-en. Sec. 9689, R. C. M. 1921; amd. Sec. 20, Ch. 491, L. 1973. Cal. C. Civ. Proc. Sec. 897.

#### Amendments

The 1973 amendment substituted "county" for "township (city or town)" in the caption of the abstract.

## CHAPTER 74—JUSTICES' COURTS—EXECUTION FROM

Section 93-7402. Form of execution.

**93-7402. (9694) Form of execution.** The execution must be directed to the sheriff or to a constable of the county, and must be subscribed by the justice and bear date the day of its issuance. It must intelligibly refer to the judgment, by stating the names of the parties, and the name of the justice before whom, and of the county where, and the time when, it was rendered; the amount of the judgment, if it be for money; and if less than the whole is due, the true amount due thereon. It must contain, in like cases, similar directions to the sheriff or constable as are required by the provisions of sections 93-5801 to 93-5845, in an execution to the sheriff, except that it shall not direct the officer to in any manner levy upon or satisfy the judgment, or any interest thereon, from any real property.

History: En. Sec. 616, p. 165, Bannack Stat.; amd. Sec. 722, p. 181, Cod. Stat. 1871; re-en. Sec. 782, 1st Div. Rev. Stat. 1879; re-en. Sec. 802, 1st Div. Comp. Stat. 1887; amd. Sec. 1641, C. Civ. Proc. 1895; amd. Sec. 1641, p. 243, L. 1897; re-en. Sec. 7061, Rev. C. 1907; re-en. Sec. 9694,

R. C. M. 1921; amd. Sec. 21, Ch. 491, L. 1973. Cal. C. Civ. Proc. Sec. 902.

#### Amendments

The 1973 amendment deleted "and the township, town, or city" following "and of the county" in the second sentence.

## CHAPTER 75—JUSTICES' COURTS—CONTEMPTS

Section 93-7501. Contempts a justice may punish for.

**93-7501. (9698) Contempts a justice may punish for.** A justice may punish for contempt persons guilty of the following acts and no other:

(1) disorderly, contemptuous, or insolent behavior toward the justice while holding the court tending to interrupt the due course of a trial or other judicial proceeding;

(2) a breach of the peace, boisterous conduct, or violent disturbance in the presence of the justice or in the immediate vicinity of the court held by him tending to interrupt the due course of a trial or other judicial proceeding;

(3) disobedience or resistance to the execution of a lawful order or process made or issued by the justice;

(4) disobedience to a subpoena duly served or refusal to be sworn or to answer as a witness;

(5) rescuing any person or property in the custody of an officer by virtue of an order or process of the court.

History: En. Sec. 1650, C. Civ. Proc. 1895; re-en. Sec. 7065, Rev. C. 1907; re-en. Sec. 9698, R. C. M. 1921; amd. Sec. 47, Ch. 344, L. 1977. Cal. C. Civ. Proc. Sec. 906.

#### Amendments

The 1977 amendment deleted "held by him" from the end of subdivision (5); and made minor changes in phraseology, punctuation and style.

## CHAPTER 76—JUSTICES' COURTS—DOCKETS

- Section 93-7602. How entries made—prima facie evidence.  
 93-7605. Proceedings when office becomes vacant.  
 93-7607. Who is the successor.

**93-7602. (9704) How entries made—prima facie evidence.** The items listed in 93-7601 must be entered in the docket under the title of the action to which they relate and, unless otherwise provided in 93-6601 through 93-7714, at the time when they occur. Such entries in a justice's docket or a transcript thereof certified by the justice or his successor in office are prima facie evidence of the facts so stated.

**History:** En. Sec. 1661, C. Civ. Proc. 1895; re-en. Sec. 7071, Rev. C. 1907; re-en. Sec. 9704, R. C. M. 1921; amd. Sec. 48, Ch. 344, L. 1977. Cal. C. Civ. Proc. Sec. 912.

**Amendments**

The 1977 amendment substituted "items listed in 93-7601" for "several particulars of the last section specified"; inserted "in the docket"; substituted "93-7714" for "93-7804"; and made minor changes in phraseology, punctuation and style.

**93-7605. (9707) Proceedings when office becomes vacant.** If the office of a justice becomes vacant because of his death or his removal from the county or for any other cause before his successor is appointed, the docket and papers that were in his possession shall be deposited in the office of some other justice in the county, who shall deliver them to the successor of the former justice. If there is no other justice in the county, the docket and papers shall be deposited in the office of the county clerk, who shall deliver them to the successor in office of the former justice.

**History:** En. Sec. 1664, C. Civ. Proc. 1895; re-en. Sec. 7074, Rev. C. 1907; re-en. Sec. 9707, R. C. M. 1921; amd. Sec. 22, Ch. 491, L. 1973; amd. Sec. 49, Ch. 344, L. 1977. Cal. C. Civ. Proc. Sec. 915.

**Amendments**

The 1973 amendment substituted "county" for "township, town, or city," near the

beginning of the first sentence; and substituted "county" for "township" near the end of the first sentence and near the beginning of the second sentence.

The 1977 amendment substituted "appointed" for "elected and qualified" near the middle of the section; and made minor changes in phraseology and punctuation.

**93-7607. (9709) Who is the successor.** The justice appointed to fill a vacancy is the successor of the justice whose office became vacant before the expiration of a full term. When a full term expires, the person elected to take the numbered office, as provided in 93-401, from that time is the successor.

**History:** En. Sec. 1666, C. Civ. Proc. 1895; re-en. Sec. 7076, Rev. C. 1907; re-en. Sec. 9709, R. C. M. 1921; amd. Sec. 23, Ch. 491, L. 1973; amd. Sec. 50, Ch. 344, L. 1977. Cal. C. Civ. Proc. Sec. 917.

**Amendments**

The 1973 amendment substituted "count-

ty" for "township, town, or city" near the end of the section.

The 1977 amendment substituted "appointed" for "elected"; substituted "take the numbered office, as provided in 93-401" for "take office in the same county"; and made a minor change in phraseology.

**93-7608. (9710) Repealed.**

**Repeal**

Section 93-7608 (Sec. 1667, C. Civ. Proc. 1895), relating to successor justices where more than one justice is equally

entitled to be successor to the former justice, was repealed by Sec. 60, Ch. 344, Laws 1977.



## CHAPTER 77—JUSTICES' COURTS—GENERAL PROVISIONS

- Section 93-7704. Acting justices.  
 93-7707. What provisions of code applicable to justices' courts.  
 93-7709. Deputy constables.  
 93-7712. Depositions—how taken.

**93-7704. (9714) Acting justices.** (1) (a) Whenever a justice of the peace is disqualified from acting in any action because of the application of subsection (1), (2), or (3) of 93-901, he shall either transfer the action to another justice court in the same county or call a justice from a neighboring county to preside in his behalf.

(b) Whenever a justice is sick, disabled, or absent and the county commissioners find that there is a delay in the proper administration of justice or the county attorney makes a written request, another justice, if there is one readily available, or a city judge or some other qualified person shall be called in to hold court for the absent justice until his return.

(c) During the time when a justice of the peace is on vacation or attending a training session, another justice of the peace of the same county shall be authorized to handle matters that otherwise would be handled by the absent justice. When there is no other justice of the peace in the county, the county commissioners shall handle the situation in the same manner as if the justice were sick or absent.

(2) Whenever a justice of the peace or another person is called in to preside over the court of a justice under subsection (1), the visiting justice or other person shall be paid all necessary and actual expenses including mileage. If the acting justice is not a justice of the peace receiving a salary, he shall also receive such compensation as is proper for the time involved. The cost of implementing this subsection is a proper charge against the county where the court is held.

(3) When another justice or any other qualified person is called to preside in a justice court, proper entries of all proceedings must be made in the docket of the justice for whom the visiting justice or person holds court. When the appointment is made by order of the county commissioners, the order shall be placed in the court docket.

(4) When called in to preside over a justice court, the visiting justice of the peace or other qualified person while acting as justice of the peace is vested with all the power of the justice for whom he holds court.

**History:** En. Sec. 626, p. 168, Bannack Stat.; re-en. Sec. 732, p. 184, Cod. Stat. 1871; re-en. Sec. 792, 1st Div. Rev. Stat. 1879; re-en. Sec. 812, 1st Div. Comp. Stat. 1887; amd. Sec. 1683, C. Civ. Proc. 1895; re-en. Sec. 7081, Rev. C. 1907; re-en. Sec. 9714, R. C. M. 1921; amd. Sec. 24, Ch. 491, L. 1973; amd. Sec. 17, Ch. 420, L. 1975; amd. Sec. 51, Ch. 344, L. 1977. Cal. C. Civ. Proc. Sec. 922.

#### Amendments

The 1973 amendment substituted "county, or adjoining county" for "township, town, or city, or adjoining township" in the middle of the first sentence.

The 1975 amendment substituted the present section for the former general section providing for a pro tem justice of the peace. For prior text, see parent volume and 1973 amendment note.

The 1977 amendment redesignated former subsections (1) through (3) as subsections (1)(a) through (1)(c); redesignated former subsections (4) through (6) as subsections (2) through (4); deleted "who while so acting is vested with the power of the justice for whom he so holds court" at the end of subsection (1)(a); substituted "city judge" for "police judge" in subsection (1)(b); deleted "and when so called and so acting that

person is vested with the power of the justice for whom he so holds court" at the end of subsection (1)(b); and made

minor changes in phraseology, punctuation and style.

**93-7707. (9717) What provisions of code applicable to justices' courts.** Because justices' courts are courts of peculiar and limited jurisdiction, only those provisions of this code which are, in their nature, applicable to the organization, powers, and course of proceedings in justices' courts or which have been made applicable by special provisions in 93-6601 through 93-7714 are applicable to justices' courts and the proceeding therein.

**History:** En. Sec. 1686, C. Civ. Proc. 1895; re-en. Sec. 7084, Rev. C. 1907; re-en. Sec. 9717, R. C. M. 1921; amd. Sec. 52, Ch. 344, L. 1977. Cal. C. Civ. Proc. Sec. 925.

#### Amendments

The 1977 amendment substituted "93-7714" for "93-7804"; and made minor changes in phraseology, punctuation and style.

**93-7709. (9719) Deputy constables.** If in any county there is no appointed constable, the board of county commissioners may, at the request of a party, after being satisfied that it is expedient to do so, specially deputize any proper person of suitable age not interested in the action to serve a summons, with or without an order to arrest the defendant and with or without a writ of attachment, or to serve an execution. The county commissioners are liable upon their official bonds for all official acts of the person so deputized. The appointment of the deputy shall be made in writing on the process, and a note thereof shall be made on the justice's docket.

**History:** En. Sec. 627, p. 168, Bannack Stat.; re-en. Sec. 733, p. 184, Cod. Stat. 1871; re-en. Sec. 793, p. 187, 1st Div. Rev. Stat. 1879; re-en. Sec. 813, 1st Div. Comp. Stat. 1887; amd. Sec. 1688, C. Civ. Proc. 1895; amd. Sec. 1, p. 138, L. 1899; re-en. Sec. 7086, Rev. C. 1907; re-en. Sec. 9719, R. C. M. 1921; amd. Sec. 25, Ch. 491, L. 1973; amd. Sec. 8, Ch. 253, L. 1975; amd. Sec. 53, Ch. 344, L. 1977.

#### Amendments

The 1973 amendment substituted "in the county" for "in such township" after "justice of the peace" in the first sentence.

The 1975 amendment substituted "county" for "township" at the beginning of the first sentence; deleted "elected" before "appointed or qualified constable"; deleted "but not otherwise" after "constable" in the first sentence; substituted "board of county commissioners" for "justice of the peace" in the first sentence; and made minor changes in phraseology and punctuation.

The 1977 amendment substituted "county commissioners" for "justice" near the beginning of the second sentence; and made minor changes in phraseology and punctuation.

**93-7712. (9722) Depositions—how taken.** Depositions to be used in justices' courts shall be taken as provided in Rules 26 and 28 to 32, inclusive of the Montana Rules of Civil Procedure.

**History:** En. Sec. 1691, C. Civ. Proc. 1895; re-en. Sec. 7089, Rev. C. 1907; re-en. Sec. 9722, R. C. M. 1921; amd. Sec. 1, Ch. 167, L. 1967.

#### Amendments

The 1967 amendment substituted

"shall" for "may" after "justices' courts"; and substituted "Rules 26 and 28 to 32, inclusive of the Montana Rules of Civil Procedure" for "sections 93-1801-1 to 93-1801-6."

CHAPTER 79—JUSTICES' COURTS—APPEALS FROM,  
TO DISTRICT COURTS

## 93-7907. (9760) Procedure on appeal, etc.

**Dismissal of Appeal**

Where defendant filed notice of appeal of adverse verdict in justice court with an undertaking on May 8, 1969 but took no further action, district court properly

granted plaintiff's motion to dismiss for unnecessary delay on July 1, 1970, since it was appellant's burden as moving party to bring appeal on for hearing. Eide Ins. v. Correll, 156 M 167, 478 P 2d 272.

## CHAPTER 80—SUPREME COURT—APPEALS TO

Section 93-8001. How judgments and orders may be reviewed.

93-8002. Party aggrieved may appeal—names of parties.

93-8013. Deposit in lieu of undertaking.

93-8001. (9729) How judgments and orders may be reviewed. A judgment or order in a civil action, except when expressly made final by this code, may be reviewed as prescribed in sections 93-7901 to 93-7908, and by the Rules of Appellate Civil Procedure, and not otherwise.

**History:** En. Sec. 248, p. 94, Bannack Stat.; re-en. Sec. 317, p. 199, L. 1867; re-en. Sec. 366, p. 107, Cod. Stat. 1871; re-en. Sec. 405, p. 149, L. 1877; re-en. Sec. 405, 1st Div. Rev. Stat. 1879; re-en. Sec. 418, 1st Div. Comp. Stat. 1887; re-en. Sec. 1720, C. Civ. Proc. 1895; re-en. Sec. 7096, Rev. C. 1907; re-en. Sec. 9729, R. C. M. 1921; amd. Sup. Ct. Ord. 11020, eff. January 1, 1966. Cal. C. Civ. Proc. Sec. 936.

M. R. App. Civ. P. amend this section, and sections 93-8002 and 93-8013 which contain references to appeals from justices' courts to district courts, so as to preserve the existing procedure applicable to such appeals.

**Amendments**

The 1965 amendment substituted "by the Rules of Appellate Civil Procedure" for "93-8001 to 93-8023" after "93-7908 and" and made a minor change in punctuation.

**Advisory Committee's Note**

Subdivisions (c), (d), (e) of Rule 41,

93-8002. (9730) Party aggrieved may appeal—names of parties. A party aggrieved may appeal in the cases prescribed in sections 93-7901 to 93-7908 and the Rules of Appellate Civil Procedure.

**History:** En. Sec. 248, p. 94, Bannack Stat.; amd. Sec. 319, p. 199, L. 1867; re-en. Sec. 368, p. 107, Cod. Stat. 1871; re-en. Sec. 407, p. 150, L. 1877; re-en. Sec. 407, 1st Div. Rev. Stat. 1879; re-en. Sec. 420, 1st Div. Comp. Stat. 1887; re-en. Sec. 1721, C. Civ. Proc. 1895; re-en. Sec. 7097, Rev. C. 1907; re-en. Sec. 9730, R. C. M. 1921; amd. Sup. Ct. Ord. 11020, eff. January 1, 1966. Cal. C. Civ. Proc. Sec. 938.

**Amendments**

The 1965 amendment substituted "the Rules of Appellate Civil Procedure" for "93-8001 to 93-8023" at the end of the present section and omitted a former second sentence which read: "The party appealing is known as the appellant, and the adverse party as the respondent."

93-8003 to 93-8006. (9731 to 9734) Superseded — M. R. App. Civ. P., Rules 1 and 4 to 6.

**Supersession**

These sections (Ap. p. Secs. 251, 252, 262, pp. 95, 97, Bannack Stat.; Secs. 320, 331, pp. 199, 201, L. 1867; Secs. 408 to 410, 431, pp. 150, 151, 157, L. 1877; Sec. 1, pp. 146, 147, L. 1899; Secs. 10, 11, Ch. 225, L. 1921; Sec. 1, Ch. 39, L. 1925;

Sec. 1, Ch. 41, L. 1941), relating to appealable judgments and orders, the taking of an appeal and the time therefor, and the undertaking or deposit on appeal, are superseded by M. R. App. Civ. P., Rules 1 and 4 to 6.



**93-8011, 93-8012. (9739, 9740) Superseded—M. R. App. Civ. P., Rules 6 and 7.****Supersession**

These sections (Ap. p. Secs. 268, 269, p. 99; Sec. 337, p. 202, L. 1867; Sec. 415, p. 152, L. 1877), relating to stay of pro-

ceedings and undertaking on appeal, are superseded by M. R. App. Civ. P., Rules 6 and 7.

**93-8013. (9741) Deposit in lieu of undertaking.** In all cases where an undertaking is required on appeal by the provisions of sections 93-7901 to 93-7908, a deposit in the court below of the amount of the judgment appealed from, and three hundred dollars in addition, shall be equivalent to filing the undertaking; and in all such cases the undertaking or deposit may be waived by the written consent of the respondent.

**History:** En. Sec. 388, p. 112, Cod. Stat. 1871; re-en. Sec. 417, p. 153, L. 1877; re-en. Sec. 417, 1st Div. Rev. Stat. 1879; re-en. Sec. 430, 1st Div. Comp. Stat. 1887; amd. Sec. 1732, C. Civ. Proc. 1895; re-en. Sec. 7108, Rev. C. 1907; re-en. Sec. 9741, R. C. M. 1921; amd. Sup. Ct. Ord. 11020,

eff. January 1, 1966. Cal. C. Civ. Proc. Sec. 948.

**Amendments**

The 1965 amendment rewrote this section. For previous text, see parent volume.

**93-8014 to 93-8025. (9742 to 9753) Superseded—M. R. App. Civ. P.****Supersession**

These sections (Secs. 260, 271, 273, pp. 96, 99, 100, Bannack Stat.; Sec. 342, p. 204, L. 1867; Secs. 418, 426 to 428, pp. 153, 156, L. 1877; Secs. 1733 to 1735, 1737, 1739 to 1744, C. Civ. Proc. 1895; Sec. 2, Ch. 35, L. 1907; Sec. 3, Ch. 42, L. 1907; Sec. 1, Ch. 47, L. 1909; Secs. 12 to

14, Ch. 225, L. 1921; Sec. 1, Ch. 19, L. 1925; Sec. 1, Ch. 87, L. 1929), relating to appeals from district courts, are superseded by the Rules of Appellate Civil Procedure. For designation of superseding rule see M. R. App. Civ. P., Table B.

**CHAPTER 86—COSTS AND DISBURSEMENTS—COST BILL—SUIT IN FORMA PAUPERIS**

Section 93-8601.1. Contractual right to attorney fees to be reciprocal.

93-8625. Poor person may sue or defend without costs.

93-8632. Costs to plaintiff in certain actions to enforce constitutional right to know.

**93-8601.1. Contractual right to attorney fees to be reciprocal.** Whenever by virtue of the provisions of any contract or obligation in the nature of a contract, made and entered into at any time after the effective date of this act, one party to such contract or obligation has an express right to recover attorney fees from any other party to the contract or obligation in the event the party having that right shall bring an action upon the contract or obligation, then in any action on such contract or obligation all parties to the contract or obligation shall be deemed to have the same right to recover attorney fees, and the prevailing party in any such action, whether by virtue of the express contractual right, or by virtue of this act, shall be entitled to recover his reasonable attorney fees from the losing party or parties.

**History:** En. Sec. 1, Ch. 259, L. 1971.

**Title of Act**

An act to extend a contractual right to attorney fees granted to one party to a

contract to the prevailing party in any lawsuit on such contract whether or not the contract expressly provides for such fees as to such prevailing party.

**Real Estate Listings Agreement**

Seller who successfully defended suit by real estate broker for payment of

sales commission was entitled to recover attorney's fees. *Flaherty v. Hensley*, — M —, 529 P 2d 1389.

**93-8602. (9787) When allowed, of course, to the plaintiff.****Attorney's Fees**

On foreclosure of mortgage, federal tax lien took priority over attorney's fees allowed under section 93-8613 since attorney's lien failed to meet "choate" test at

the time the amount of federal taxes owed on the property was fixed. *First Nat. Bank of Lewistown v. Tilzey*, 238 F Supp 750.

**93-8605. (9790) When the several defendants are not united, etc.****References**

State ex rel. *Gage v. District Court*, 148 M 284, 419 P 2d 746, 748.

**93-8606. (9791) Costs of appeal discretionary with the court, etc.****References**

*Stalcup v. Montana Trailer Sales & Equipment Co.*, 146 M 494, 409 P 2d 542.

**93-8613. (9798) Counsel fees on foreclosure.****Intervenor**

Where party intervened in action to foreclose mortgage in an effort to have title quieted in his behalf as against both mortgagee and mortgagor, it was error to award intervenor judgment for attorney's fees under this section since intervenor qualified as neither mortgagee bringing foreclosure action nor as possible successful mortgagor defending such action. *Nikles v. Barnes*, 153 M 113, 454 P 2d 608.

**Priority of Claim**

On foreclosure of mortgage, federal tax lien took priority over attorney's fees allowed under this section since attorney's lien failed to meet "choate" test at the time the amount of federal taxes owed on the property was fixed. *First Nat. Bank of Lewistown v. Tilzey*, 238 F Supp 750.

**93-8614. (9799) Filing costs and attorney's fees, etc.****Prematurely Filed Lien**

Attorney's fees incurred in an attempt to foreclose on liens invalid because pre-

mature could not be recovered under this section. *Western Plumbing of Bozeman v. Garrison*, — M —, 556 P 2d 520.

**93-8618. (9802) What are costs and disbursements.****Attorney Fees**

Attorney fees are not included as costs under this section, so that if such costs in a divorce action were not allowed under former section 21-137, the wife was not entitled to them on execution under section 93-8621. *State ex rel. Sowerwine v. District Court*, 145 M 375, 401 P 2d 568.

Attorney fees which amounted to only about 10% of the judgment recovered were not excessive nor wrongfully awarded. *Haggerty v. Selsco*, — M —, 534 P 2d 874.

counsel could not be included in bill of costs where never filed with the court and plaintiff had no practical means of securing a copy; it was obviously a discovery deposition for defendant's own benefit. *Johnson v. Furgeson*, 158 M 170, 489 P 2d 1032; *Lovely v. Burroughs Corp.*, — M —, 527 P 2d 557.

**Depositions**

In action contesting assessment of net proceeds tax of mining industry, board of equalization was properly assessed costs of contestant's expense of taking deposition of secretary of board of equalization where contestant prevailed and deposition was for the benefit of the court and both parties, having been introduced into evi-

dence by agreement of both parties. *Pfizer, Inc. v. Madison County*, 161 M 261, 505 P 2d 399.

#### References

*Kintner v. Harr*, 146 M 461, 408 P 2d 487; *State ex rel. Ald, Inc. v. District Court*, 147 M 221, 410 P 2d 944.

### 93-8621. (9805) Costs on appeal—how claimed.

#### Execution Void

In divorce proceeding, inclusion in memorandum of both allowable statutory costs under section 21-137 and attorney's fee, to which the wife was not entitled because of failure to file motion on appeal, constituted noncompliance with this sec-

tion and made the execution void. *State ex rel. Sowerwine v. District Court*, 145 M 375, 401 P 2d 568.

#### References

*State ex rel. Ald, Inc. v. District Court*, 147 M 221, 410 P 2d 944.

**93-8625. (9809) Poor person may sue or defend without costs.** Any person may commence and prosecute or defend an action in any of the courts and administrative tribunals of this state who will file an affidavit stating that he has a good cause of action or defense, that he is unable to pay the costs, or procure security to secure the same; then it is hereby made the duty of the officers of the courts and administrative tribunals to issue all writs and serve the same, and perform all services in the action, without demanding or receiving their fees in advance.

**History:** En. Sec. 2, p. 71, L. 1869; re-en. Sec. 563, p. 150, Cod. Stat. 1871; amd. Sec. 1, p. 40, Ex. L. 1873; amd. Sec. 503, p. 173, L. 1877; re-en. Sec. 503, 1st Div. Rev. Stat. 1879; re-en. Sec. 516, 1st Div. Comp. Stat. 1887; re-en. Sec. 1873, C. Civ. Proc. 1895; re-en. Sec. 7176, Rev. C. 1907; re-en. Sec. 9809, R. C. M. 1921; amd. Sec. 1, Ch. 71, L. 1971; amd. Sec. 1, Ch. 90, L. 1973.

#### Preamble

Chapter 90 of Laws 1973 contained a

preamble which read: "WHEREAS, section 93-8625, R. C. M. 1947, gives the right to sue or defend in any of the courts of this state to poor persons without costs, amendment should be made to remove any ambiguity as to whether this would also include administrative tribunals."

#### Amendments

The 1971 amendment inserted "or defend" and "or defense."

The 1973 amendment inserted "and administrative tribunals" in two places.

**93-8632. Costs to plaintiff in certain actions to enforce constitutional right to know.** A plaintiff who prevails in an action brought in district court to enforce his rights under article II, section 9 of the Montana constitution may be awarded his costs and reasonable attorneys' fees.

**History:** En. 93-8632 by Sec. 1, Ch. 493, L. 1975.

#### Title of Act

An act to award costs and reasonable

attorneys' fees to a plaintiff who brings a successful action under the right to know provision of the Montana constitution.

## CHAPTER 89—UNIFORM DECLARATORY JUDGMENTS ACT

### 93-8901. (9835.1) Scope.

**NOTE.**—Uniform State Law. In addition to the states listed in the note in the parent volume the following also have adopted the Uniform Declaratory Judgments Act: Oklahoma and Virginia.

#### Administrative Orders and Regulations

A declaratory judgment establishes the rights and duties of the parties; it is not

a proper vehicle to obtain relief from rulings within the jurisdiction of administrative bodies exercising judicial or quasi-judicial powers. *Matter of Dewar*, — M —, 548 P 2d 149.

#### Contracts

In proceeding under this act, court's resolution of ambiguity on face of con-



tract constituted construction, not contract reformation. *Heller v. Osburnsen*, — M —, 510 P 2d 13.

### Jurisdiction

Original jurisdiction of action arising out of a dispute as to the interpretation of a tax statute, and involving no factual dispute, was accepted by the court where appeal to the state tax appeal board was pending upon court's acceptance of jurisdiction. *First Nat. Bank of Lewistown v. Department of Revenue*, — M —, 541 P 2d 1219.

### Justiciable Controversy

District judge's petition to the supreme court seeking determination of his authority over grand jury subpoenas, his authority to examine grand jury proceedings to determine whether instructions given upon empanelment are being adhered to, and his authority to determine whether agents of the grand jury are acquitting themselves legally and appropriately as attaches of the court, was in the nature of a request for a declaratory judgment, not an advisory opinion, and presented a justiciable controversy within the contemplation of this act, because (1) it involved a controversy concerning existing and genuine rights, (2) a judgment of the court might effectively operate on such a controversy, and (3) judicial determination would have the effect of a final judgment upon the rights of the parties. *Matter of Secret Grand Jury Inquiry*, — M —, 553 P 2d 987.

## 93-8906. (9835.6) Discretionary.

### Discretion of Court

In absence of showing of abuse of discretion, refusal of lower court to rule on issue for reason that decree would not terminate controversy or remove uncertainty will not be reversed. *Helena Valley Irrig. Dist. v. State Highway Commission*, 150 M 192, 433 P 2d 791.

### Dismissal of Action

Court did not abuse its discretion in dismissing insurance company's action for

## 93-8909. (9835.9) Jury trial.

### References

*Mahan v. Hardland*, 147 M 78, 410 P 2d 156.

## 93-8911. (9835.11) Parties.

### Dismissal of Action

Court could take into account this section in refusing to grant declaratory judgment in favor of insurance company

### Supreme Court

Supreme court could accept original jurisdiction in suit for declaratory judgment where statute which taxed nonresident contractors indiscriminately was declared unconstitutional, since supreme court was a court of record and under its own rules could accept original jurisdiction in emergency situations. *State ex rel. Schultz-Lindsay Constr. Co. v. State Board of Equalization*, 145 M 380, 403 P 2d 635.

Supreme court could entertain original action for declaratory judgment on calling, election of delegates to and implementation of constitutional convention required by vote of the electors in view of necessity for legislature to act within 60-day session then in progress. *Forty-Second Legislative Assembly v. Lennon*, 156 M 416, 481 P 2d 330.

### Termination of Annexation Proceedings

Where a majority of the resident freeholders of a first class city validly protested proposed annexation under section 11-403 (1), but city council instead of terminating the annexation proceedings took arbitrary action, mandamus was proper to compel council to terminate the process. This chapter did not furnish the protestants a plain, speedy and adequate remedy. *State ex rel. Konen v. City of Butte*, 144 M 95, 394 P 2d 753, 757.

### References

*Harrer v. Northern Pacific Ry. Co.*, 147 M 130, 410 P 2d 713.

declaratory judgment that defendant's policy was void because obtained by fraud, since, under section 93-8911, there were possible parties not joined, defendant having been in an accident several months prior to expiration of the policy, and under this section, court could refuse to enter the judgment on the basis that it would not terminate the controversy as to all parties. *Empire Fire & Marine Ins. Co. v. Goodman*, 147 M 396, 412 P 2d 569.

which claimed that defendant's policy was void when accident in which he was involved occurred because there were other parties not joined and therefore the declar-

atory judgment would not terminate the controversy should other parties sue defendant. *Empire Fire & Marine Ins. Co. v. Goodman*, 147 M 396, 412 P 2d 569.

#### References

*Harrer v. Northern Pacific Ry. Co.*, 147 M 130, 410 P 2d 713.

### 93-8912. (19835.12) Construction.

#### References

*Harrer v. Northern Pacific Ry. Co.*, 147 M 130, 410 P 2d 713.

## CHAPTER 90—CERTIORARI (WRIT OF REVIEW)

### 93-9002. (19837) When and by what courts granted.

#### District Court Writ of Certiorari

Certiorari is never properly granted where the matters over which review is sought are pending or undetermined; thus, district court could not properly issue writ of certiorari to determine, in a case pending before the police commission, whether the commission could compel a witness' testimony. *Matter of Dewar*, — M —, 548 P 2d 149.

#### Zoning Resolution

Although scope of review upon writ of

certiorari is ordinarily limited to whether the inferior tribunal has exceeded its jurisdiction, further inquiry is permitted by the provisions of section 16-4706(8) and (11), which grant the district courts a broader scope of review than the general Montana statutes pertaining to certiorari. *Bryant Development Assn. v. Dagel*, — M —, 531 P 2d 1320.

#### References

*Mailey v. Board of County Commrs.*, 142 M 505, 385 P 2d 74.

### 93-9004. (19839) The writ to be directed to the inferior tribunal, etc.

#### Direction of Writ

Although writ of certiorari was properly directed to the board of adjustment, the board is not the defendant, and certain procedural difficulties could have been

avoided if the adverse party had been properly designated as defendant. *Bryant Development Assn. v. Dagel*, — M —, 531 P 2d 1320.

### 93-9008. (19843) The review under the writ, extent of.

#### References

*Mailey v. Board of County Commrs.*, 142 M 505, 385 P 2d 74.

## CHAPTER 91—MANDAMUS (WRIT OF MANDATE)

### 93-9102. (19848) When and by what court issued.

#### Clear Legal Duty

Board of county commissioners was properly denied writ of mandate requiring sheriff to provide detailed itemized accounting of county funds received for furnishing board to prisoners of county jail since sheriff has no clear legal duty to provide such an accounting. *State ex rel. Lucier v. Murphy*, 156 M 186, 478 P 2d 273 (Decision prior to 1971 amendment of section 16-2818).

#### Discretionary Actions

Mandamus lies only to compel performance of an act, not to correct action already done, so that where state board of land commissioners exercised discre-

tion in awarding lease of land to lowest bidder, mandamus was not the proper writ to pursue in seeking a remedy. *State ex rel. Thompson v. Babcock*, 147 M 46, 409 P 2d 808.

Trial court properly denied writ of mandate, sought pursuant to this section, to require city to condemn private lands for use as public streets, since this section provides for performance of ministerial duty and not duty or power that requires exercise of discretion. *State ex rel. Wiedman v. City of Kalispell*, 154 M 31, 459 P 2d 694.

#### Equitable Relief

Although writ of mandamus was not a

permissible remedy to correct or undo action already taken, plaintiff who was disqualified from voting because of violation of federal liquor laws was entitled to equitable relief and adjudication of his rights. *Melton v. Oleson*, — M —, 530 P 2d 466.

#### License for Mobile Home Court

Action of town council in refusing to issue a mobile home court license until petitioner had removed a house which encroached onto a public alley, was not an abuse of discretion, and mandamus will not lie to compel the issuance of the license. *State ex rel. Barnes v. Town of Belgrade*, — M —, 524 P 2d 1112.

#### Termination of Annexation Proceedings

Where a majority of the resident freeholders of a first class city validly protested proposed annexation under section 11-403 (1), but city council instead of terminating the annexation proceedings, took arbitrary action, mandamus was proper to compel council to terminate the process. The Uniform Declaratory Judgments Act (93-8901 to 93-8916) did not furnish the protestants a plain, speedy and adequate remedy. *State ex rel. Konen v. City of Butte*, 144 M 95, 394 P 2d 753, 757.

### 93-9103. (9849) Writ—when and upon what to issue.

#### Adequacy of Other Remedy

Where subsequent tax sale certificates purchaser gave notice of intention to apply for tax deed on certain date and prior certificates purchaser tendered payment to county treasurer for redemption of such subsequent certificates but his tender was refused, writ of mandate was proper remedy to effect his redemption, since no other available remedies would be certain, plain, adequate, or speedy. *State ex rel. Burkhartsmeier Bros. v. McCormick*, — M —, 510 P 2d 266.

#### Appealable Matters

Engineer seeking registration from state board had no right to a writ of mandamus where discretion of the board was subject to review under section 66-2345. *Heldenbrand v. Montana State Board of Registration for Professional Engineers and Land Surveyors*, 147 M 271, 411 P 2d 744.

#### County Claims

Where justice of peace incurred unbudgeted expenses and county commissioners refused to pay, writ of mandate,

under this section, rather than declaratory judgment, under 16-1808, was proper remedy. *State ex rel. Browman v. Wood*, — M —, 543 P 2d 184.

#### Labor Standards Division

Petitioner's right to file action at law against employer for nonpayment of wages was not an alternative remedy to a mandamus petition to compel commissioner of labor to hold a hearing, since the alternative, plain, speedy, and adequate remedy at law must be one which can be pursued by petitioner to compel the performance of the official duty. *Burgess v. Softich*, — M —, 535 P 2d 178.

#### Mandamus to Compel Disqualification of Justice of the Peace

Since section 95-2009, by providing for a trial de novo in the district court, provided a plain, adequate and speedy remedy at law, mandamus did not lie to compel justice of the peace to honor motion for disqualification. *Bailey v. State*, — M —, 517 P 2d 708.

### 93-9109. (9855) Motion for new trial—where made.

#### Motion Not Required

This section does not require motion for new trial in order to appeal from a grant of mandamus, but merely sets out

the place of filing for a motion for new trial. *State ex rel. Bennett v. Dowdall*, 157 M 11, 482 P 2d 572.

### 93-9112. (9858) Damages, costs and peremptory mandate, etc.

#### Attorney Fees

Although writ of mandate was issued by district court, since it was not a permissible remedy, and the decision in favor of the plaintiff was made on the basis of equitable relief and adjudication of his rights, the award of attorney fees will be set aside. *Melton v. Oleson*, — M —, 530 P 2d 466.

#### Damages Incidental to Pleading

After repeated refusals by county to follow assessment procedures prescribed by state board of equalization, and after other delays and hindrances by the county, including the filing of sham pleadings, Supreme Court will, if there is further delay in complying with writ of mandamus, consider assessing costs and damages



under this section. State ex rel. State Board of Equalization v. Price, 157 M 134, 483 P 2d 284.

#### References

State ex rel. Thompson v. Babcock, 147 M 46, 409 P 2d 808.

### CHAPTER 92—PROHIBITION—WRIT OF

#### 93-9201. (9861) Prohibition defined.

##### Judicial Error Required

Writ of prohibition was issued, pursuant to this section, where district court had acted beyond its jurisdiction by enjoining board of equalization from revising grading and valuation on nonirrigated farm land pursuant to section 84-429.7 et seq. State ex rel. Lord v. District Court, 154 M 269, 463 P 2d 323.

##### Municipal Corporation

Lower court properly refused petition for writ of prohibition against city acting within jurisdiction since writ lies only when municipal corporation acts without or in excess of jurisdiction. State ex rel.

Pat Griffin Co. v. City of Butte, 151 M 546, 445 P 2d 739.

##### Public Service Commission

Since federal price-freeze order did not prevent rate hearings by the public service commission, though it did prevent putting increases into effect, commission had jurisdiction to hold hearings and writ of prohibition was improper. State ex rel. Department of Public Service Regulation v. District Court, 158 M 88, 488 P 2d 1147.

#### References

State ex rel. Belwin, Inc. v. Davison, 148 M 345, 420 P 2d 842, 844.

### CHAPTER 97—FORCIBLE ENTRY AND UNLAWFUL DETAINER—ACTIONS FOR

Section 93-9705. What courts have jurisdiction.

93-9706. Parties defendant.

93-9712.1. Continuance, when bond required.

#### 93-9703. (9889) Unlawful detainer defined.

##### Agricultural Tenant Holding Over

Statute gives agricultural tenant right to hold over for no other purpose than to harvest crops and protect investment and does not mean that tenant can exercise option to purchase contained in expired lease. Miller v. Meredith, 149 M 125, 423 P 2d 595.

##### Landlord-tenant Relationship Required

An action for unlawful detainer can succeed only where the relation of landlord-tenant exists. Kransky v. Hensleigh, 146 M 486, 409 P 2d 537.

##### Unlawful Ejectment

In case of unlawful ejectment, plaintiff, who had farmed land for three years, paying one third of each crop as rent, was not a sharecropper but a tenant with an interest in the land for a term and it was proper for the judge to instruct the jury that if plaintiff held without notice to quit more than sixty days after expiration of his term he was deemed to be holding by permission of the defendant-landlords and not guilty of unlawful detainer. Kenfield v. Curry, 145 M 174, 399 P 2d 999.

93-9705. (9891) What courts have jurisdiction. The district court of the county in which the property, or some part of it, is situated, shall have jurisdiction of proceedings under this chapter; provided, that justices' courts, within their respective counties, shall have concurrent jurisdiction.

History: En. Sec. 2084, C. Civ. Proc. 1895; re-en. Sec. 7273, Rev. C. 1907; re-en. Sec. 9891, R. C. M. 1921; amd. Sec. 26, Ch. 491, L. 1973. Cal. C. Civ. Proc. Sec. 1163.

##### Amendments

The 1973 amendment substituted "counties" for "towns, townships, or cities" near the end of the section.

##### Repealing Clause

Section 27 of Ch. 491, Laws 1973 read "Sections 25-303, 25-305, and 25-306, R. C. M. 1947, are repealed."

**93-9706. (9892) Parties defendant.** No person other than the tenant of the premises, and subtenant if there be one, in the actual occupation of the premises when the complaint is filed, need be made parties defendant in the proceeding, nor shall any proceeding abate, nor the plaintiff be non-suited for the nonjoinder of any person who might have been made party defendant; but when it appears that any of the parties served with process, or appearing in the proceeding, is guilty of the offense charged, judgment must be rendered against such party. In case a defendant has become a subtenant of the premises in controversy, after the service of the notice provided for by part 2 of section 93-9703, upon the tenant of the premises, the fact that such notice was not served on each subtenant shall constitute no defense to the action. In case a married person is a tenant or subtenant, failure to join such person's spouse shall constitute no defense; but in case the spouse is not joined, an execution issued upon a personal judgment against the tenant or subtenant can only be enforced against property on the premises at the commencement of the action or against property that is owned solely by the tenant or subtenant and not by his spouse. All persons who enter the premises under the tenant, after the commencement of the action, shall be bound by the judgment, the same as if he or they had been made party to the action.

**History:** En. Sec. 2085, C. Civ. Proc. 1895; re-en. Sec. 7274, Rev. C. 1907; re-en. Sec. 9892, R. C. M. 1921; amd. Sec. 58, Ch. 535, L. 1975. Cal. C. Civ. Proc. Sec. 1164.

**Amendments**

The 1975 amendment substituted "married person" for "married woman" in the third sentence; substituted "failure to join such person's spouse shall constitute no defense" for "her coverture shall con-

stitute no defense"; substituted "the spouse" for "her husband"; deleted "or unless she has separate property" after "spouse is not joined" in the third sentence; substituted "the tenant or subtenant" for "her" in the third sentence; substituted "property that is owned solely by the tenant or subtenant and not by his spouse" for "her separate property"; and made minor changes in phraseology and punctuation.

**93-9712.1. Continuance, when bond required.** Actions filed in justice court under this chapter shall be tried within 10 days after the appearance or answer date stated in the summons, unless the defendant applying for a continuance shall give an undertaking to the adverse party, with good and sufficient security to be approved by the court, conditioned for the payment of all damages and rent that may accrue if judgment be rendered against the defendant. The plaintiff and defendant may stipulate to a continuance of the trial beyond the limit of this section without the necessity of an undertaking.

**History:** En. 93-9712.1 by Sec. 1, Ch. 166, L. 1977.

**Title of Act**

An act to provide that unlawful detainer actions filed in justice court be tried within 10 days.

**CHAPTER 98—CONTEMPTS**

**93-9801. (9908) What acts or omissions are contempts.**

**Criticism of Decisions**

Bank president's statement that he was displeased with jury verdict against bank

and that jurors could not expect to do business with bank did not constitute contempt under subsection 9, since jurors

did continue to do business with bank and since statement came twenty-two days after final disposition of case and could not have interfered with court proceedings. State ex rel. Polish v. District Court Third Judicial District in and for County of Powell, 156 M 220, 478 P 2d 270.

#### References

Weinheimer v. Scott, 143 M 243, 388 P 2d 790.

### 93-9803. (9910) A contempt committed in the presence of the court, etc.

#### Recital of Facts in Order

Order of contempt that failed to specify facts that constituted contempt before the court was deficient under this section,

since it did not provide opportunity for appellate review. State ex rel. Shea v. District Court, 156 M 266, 479 P 2d 281.

### 93-9810. (9917) Judgment and penalty, if guilty.

#### Excessive Penalty

District court's sentence of ten days' imprisonment for contempt exceeded

jurisdiction of such court as vested in it by this section. Fuchs v. District Court, 153 M 485, 458 P 2d 776.

## CHAPTER 99—EMINENT DOMAIN

Section 93-9902.	What are public uses.
93-9902.1.	Policy on surface mining or open pit mining of coal.
93-9905.	Facts necessary to be found before condemnation.
93-9908.	The complaint and its contents.
93-9911.	Power of court—preliminary condemnation order.
93-9912.	Appointment and meeting of commissioners.
93-9913.	The date with respect to which compensation shall be assessed.
93-9921.1.	Necessary expenses of litigation.
93-9921.2.	Necessary expenses of litigation.
93-9927.	Relocation assistance—purpose of act.
93-9928.	Definition of terms in relocation assistance law.
93-9929.	Payments to displaced persons—moving expense allowance—business losses.
93-9930.	Additional payments for displacement from dwelling owned by occupant.
93-9931.	Additional payments for displacement from rented dwelling.
93-9932.	Relocation advisory services.
93-9933.	Assurance of availability of suitable replacement dwellings.
93-9934.	Relocation costs included in project costs—replacement housing.
93-9935.	Public assistance eligibility unimpaired—tax exemption of payments.
93-9936.	Appeal to district court from administrative determination.
93-9937.	Appraisal and negotiation policies—time allowed to move—condemnation proceedings.
93-9938.	Advancement of closing costs and taxes incurred by owner.
93-9939.	Reimbursement of costs when condemnation proceedings abandoned.
93-9940.	Expenses included in inverse condemnation judgment or settlement.
93-9941.	Acquisition of buildings and improvements affected—payments to tenant.
93-9942.	Duplication of eminent domain payments not intended.
93-9943.	New rights and powers not created.
93-9944.	Application to all federally assisted programs.

93-9902. (9934) What are public uses. Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses:



1 to 3. \* \* \* [Same as parent volume.]

4. Wharves, docks, piers, chutes, booms, ferries, bridges, of all kinds, private roads, plank and turnpike roads, railroads, canals, ditches, flumes, aqueducts, and pipes for public transportation, supplying mines, mills, and smelters for the reduction of ores and farming neighborhoods with water, and drainage and reclaiming lands, and for floating logs and lumber on streams not navigable, and sites for reservoirs, necessary for collecting and storing water. Provided, however, that such reservoir sites must possess a public use demonstrable to the district court as the highest and best use of the land.

5. Roads, tunnels, ditches, flumes, pipes, and dumping places for working mines, mills, or smelters for the reduction of ores; also outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse matter from mines, mills and smelters for the reduction of ores, also an occupancy in common by the owners or the possessors of different mines of any place for the flow, deposit, or conduct of tailings or refuse matter from their several mines, mills, or smelters for reduction of ores, and sites for reservoirs necessary for collecting and storing water. Provided, however, that such reservoir sites must possess a public use demonstrable to the district court as the highest and best use of the land.

6 to 14. \* \* \* [Same as parent volume.]

15. To mine and extract ores, metals or minerals owned by the plaintiff located beneath or upon the surface of property where the title to said surface vests in others; provided, however, the use of the surface for strip mining or open pit mining of coal (i.e., any mining method or process in which the strata or overburden is removed or displaced in order to extract the coal) is not a public use and eminent domain may not be exercised for this purpose.

History: En. Sec. 580, p. 189, L. 1877; re-en. Sec. 580, 1st Div. Rev. Stat. 1879; re-en. Sec. 598, 1st Div. Comp. Stat. 1887; amd. Sec. 2211, C. Civ. Proc. 1895; amd. Sec. 1, p. 135, L. 1899; amd. Sec. 1, Ch. 4, L. 1907; Sec. 7331, Rev. C. 1907; re-en. Sec. 9934, R. C. M. 1921; amd. Sec. 1, Ch. 245, L. 1953; amd. Sec. 6, Ch. 259, L. 1955; amd. Sec. 1, Ch. 216, L. 1961; amd. Sec. 1, Ch. 311, L. 1973; amd. Sec. 1, Ch. 375, L. 1974. Cal. C. Civ. Proc. Sec. 1238.

The 1974 amendment added the provisos to the end of subdivisions 4 and 5.

#### Electric Power

Legislature has specifically declared that an electric power line is public use for which private property may be taken by eminent domain proceedings under this section, and public use is not confined to actual use by public, but is measured in terms of right of public to use proposed facilities for which condemnation is sought. *Montana Power Co. v. Bokma*, 153 M 390, 457 P 2d 769.

#### Amendments

The 1973 amendment added the proviso to subdivision 15.

93-9902.1. Policy on surface mining or open pit mining of coal. For the following reasons the state's power of eminent domain may not be exercised to mine and extract coal owned by the plaintiff located beneath the surface of property where the title to the surface is vested in others:

(1) Because of the large reserves of and the renewed interest in coal in eastern Montana, coal development is potentially more destructive to land and watercourses and underground aquifers and potentially more

extensive geographically than the foreseeable development of other ores, metals, or minerals, and affecting large areas of land and large numbers of people;

(2) That in many areas of Montana set forth in (a) hereinabove, the title to the surface is vested in an owner other than the mineral owner, and that the surface owner is putting that surface to a productive use, and it is the public policy of the state to encourage and foster such productive use by such owner, and that to permit the mineral owner to condemn the surface owner is to deprive the surface owner of the right to use his property in a productive manner as he determines, and is also contrary to public policy as set forth in paragraph four (4) herein below;

(3) The magnitude of the potential coal development in eastern Montana will subject landowners to undue harassment by excessive use of eminent domain;

(4) That it is the public policy of the state to encourage and foster diversity of land ownership and that the surface mining of coal and control of large areas of land by the surface coal mining industry would not foster public policy and further the public interest.

**History:** En. 93-9902.1 by Sec. 2, Ch. 311, L. 1973.

#### **Title of Act**

An act amending section 93-9902,

R. C. M. 1947, to declare that the extraction of coal by strip mining or open pit mining is not a public use; and setting forth the public policy therefor.

### **93-9904. (9936) Private property defined—classes enumerated.**

#### **Discretionary Actions**

Action brought to compel state highway commission to construct two interchanges on new interstate highway near town, instead of one interchange as planned, was improperly brought under this section since this section pertains to eminent domain proceedings and issues presented by action were matters of administrative law under section 32-2406. *Erie v. State ex rel. State Highway Commission*, 154 M 150, 461 P 2d 207, distinguished in 155 M 39, 47, 466 P 2d 594.

#### **Judicial Review**

In condemnation proceeding involving access to portion of farm divided by interstate highway, district court had power to require state to incorporate in its construction plans such structures as would allow two-lane access across county road where access road benefited general public as well as private property owner; but district court did not have power to require state to submit such plans to court for its approval since such matters were within purview of activities of highway commission. *State ex rel. State Highway Commission v. Lavoie*, 155 M 39, 466 P 2d 594, explained in 159 M 248, 496 P 2d 1140, 1143.

#### **More Necessary Public Use**

Requirement under section 93-9906 that taking of private property by condemnation proceedings must be compatible with greatest public good and least private injury applies specifically to easements and rights of way under this section. *Montana Power Co. v. Bokma*, 153 M 390, 457 P 2d 769.

Public property held by city and taken by state for more necessary public use should be taken and compensated as if it had been taken from a private owner. *City of Three Forks v. State Highway Commission*, 156 M 392, 480 P 2d 826.

#### **Underpass**

Where 40.89 acres of ranch land were taken by the state highway commission as a right of way for an interstate highway, consisting of four lanes in width and fully controlled access, which split the remaining land into two divisions, leaving 432.69 acres, on which farm headquarters was located, on the north side of the highway and 393.42 acres on the south side of the highway, trial court in its preliminary order of condemnation properly ordered the commission to construct and maintain at its own expense an underpass leading from one side of the highway to the other. *State ex rel. State Highway Commission v. Wheeler*, 148 M 246, 419 P 2d 492, 496.

93-9905. (9937) Facts necessary to be found before condemnation. 1 and 2. \* \* \* [Same as parent volume.]

3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use. The plaintiff or defendant, or any party interested in the proceedings, can appeal to the supreme court from any finding or judgment made or rendered under this chapter, as in other cases. Such appeal does not stay any further proceedings under this chapter, except that the district court on motion or ex parte may grant a stay for such period of time and under such conditions as the court deems proper.

History: En. Sec. 583, p. 191, L. 1877; re-en. Sec. 583, 1st Div. Rev. Stat. 1879; re-en. Sec. 601, 1st Div. Comp. Stat. 1887; amd. Sec. 2214, C. Civ. Proc. 1895; re-en. Sec. 7334, Rev. C. 1907; re-en. Sec. 9937, R. C. M. 1921; amd. Sup. Ct. Ord. 11020, eff. January 1, 1966. Cal. C. Civ. Proc. Sec. 1241.

#### Advisory Committee's Note

Subdivision (f) Rule 41, M. R. App. Civ. P., amends the provision of subdivision 3 of this section to permit the district court to stay proceedings on appeals in eminent domain cases, as is permitted by Rule 7(a) of these rules in other cases. See Tables A, B, C, M. R. App. Civ. P. for reference to other amendments.

#### Amendments

The 1965 amendment added the exception at the end of the section.

#### Burden of Proof

Where commission condemned defendant's land to build bypass through it rather than reconstruct highway through town, it became incumbent upon the defendant to show fraud, abuse of discretion or arbitrary action in order to defeat the commission's action, while the commission had only to establish that the taking of the property was reasonably necessary for rebuilding the highway and that their decision appeared to be compatible with the greatest public good and least private injury on the basis of conflicting evidence. *State Highway Commission v. Crossen-Nissen Co.*, 145 M 251, 400 P 2d 283, distinguished in 155 M 39, 47, 466 P 2d 594.

Highway department resolution of public interest and necessity established a disputable presumption that requirements for condemnation had been satisfied, which presumption was not overcome by evidence that a possible alternative route might have been selected. *State, Department of Highways v. Higgins*, — M —, 530 P 2d 776.

#### Condemnor's Discretion

Highway commission did not abuse its discretion in taking farm land by eminent

domain even though it was shown that town through which old highway had passed would be financially harmed and bypass would cost more to build, since the resulting savings in travel costs to highway users, in addition to the compensation paid the petitioners, offset disadvantages claimed by them. *State Highway Commission v. Crossen-Nissen Co.*, 145 M 251, 400 P 2d 283, distinguished in *State Highway Commission v. Danielsen*, 146 M 539, 409 P 2d 443; 155 M 39, 47, 466 P 2d 594.

#### More Necessary Public Use

Condemnation of city-owned property between sidewalk and boundary of school yard for the purpose of erecting a fence was a more necessary public use, in view of the protection for the children. *State ex rel. Smart v. City of Big Timber*, — M —, 528 P 2d 688.

#### Necessity of Use

The word "necessary" as used in this section does not mean that the property must be indispensable to the proposed project, but that it must be reasonably requisite and proper for the accomplishment of the purpose for which it is sought under the peculiar circumstances of each case. *State Highway Commission v. Crossen-Nissen Co.*, 145 M 251, 400 P 2d 283.

Before district court may order condemnation, this section requires that it must find that proposed taking is necessary to public use under circumstances of individual case. *Montana Power Co. v. Bokma*, 153 M 390, 457 P 2d 769.

Where an easement to remove obstructions and prevent future obstructions would have been sufficient to assure safe flight to and from an airport runway, preliminary order of condemnation of fee simple was error. *Silver Bow County v. Hafer*, — M —, 532 P 2d 691.

#### References

*State Highway Commission v. Danielsen*, 146 M 539, 409 P 2d 443.



**93-9906. (9938) Parties may make location—may enter, etc.****Compatible with Public Good**

Where power company had studied alternate routes for power lines, surveyed surrounding area and determined that best possible route for such line was across defendant's property, utility had complied with this section in that taking of private property was compatible with

greatest public good and least private injury. *Montana Power Co. v. Bokma*, 153 M 390, 457 P 2d 769.

**References**

*State Highway Commission v. Danielson*, 146 M 539, 409 P 2d 443.

**93-9908. (9940) The complaint and its contents.** The complaint must contain:

1. \* \* \* [Same as parent volume.]

2. The names of all owners, mortgagees and lien holders of record and any other claimants of the property of record, if known, or a statement that they are unknown, who must be styled defendants.

3 to 5. \* \* \* [Same as parent volume.]

6. If a sand, stratum or formation suitable for use as an underground natural gas storage reservoir is sought to be appropriated, a description thereof and of the land in which it is alleged to be contained, and a description of all other property and rights sought to be appropriated for use in connection with the appropriation of the right to store natural gas in and withdraw natural gas from such reservoir. In addition, the complaint shall state facts showing that the underground reservoir is one subject to appropriation by plaintiff; also stating that the underground storage of natural gas in the land sought to be appropriated is in the public interest; that the underground reservoir is suitable and practicable for natural gas storage; that the plaintiff in good faith has been unable to acquire the rights sought to be appropriated hereunder and a statement that the rights and property sought to be appropriated are not prohibited by law; and in addition, the complaint must be accompanied by a certificate from the board of oil and gas conservation as set forth in section 60-804.

**History:** En. Sec. 586, p. 192, L. 1877; re-en. Sec. 586, 1st Div. Rev. Stat. 1879; re-en. Sec. 604, 1st Div. Comp. Stat. 1887; amd. Sec. 2217, C. Civ. Proc. 1895; re-en. Sec. 7337, Rev. C. 1907; re-en. Sec. 9940, R. C. M. 1921; amd. Sec. 3, Ch. 245, L. 1953; amd. Sec. 8, Ch. 259, L. 1955; amd. Sec. 1, Ch. 197, L. 1973; amd. Sec. 206, Ch. 253, L. 1974. Cal. C. Civ. Proc. Sec. 1244.

**Amendments**

The 1973 amendment inserted "mortgagees and lien holders of record" following "owners," "any other" before "claimants" and "of record" following "property" in subdivision 2.

The 1974 amendment substituted "the board of oil and gas conservation as set forth in section 60-804" for "the state oil and gas conservation commission as set forth in section 93-804" at the end of subdivision 6.

**93-9909. (9941) Summons, what to contain, etc.****Service of Complaint with Summons**

Requirement that a copy of the complaint must be served with the summons is effectively met, so long as both are served at least twenty days prior to the

time designated for hearing, and there is no requirement that they be served on the same day. *State Highway Commission v. District Court*, 160 M 35, 499 P 2d 1228, explained in 510 P 2d 9, 11.

**93-9911. (9943) Power of court—preliminary condemnation order.** The court or judge has power:

1 to 4. \*\*\* [Same as parent volume.]

5. If the property sought to be appropriated is a sand, stratum or formation suitable for use as an underground natural gas storage reservoir and the existence and suitability of it for such use has been proved by plaintiff upon substantial evidence, the order of the court or judge shall direct the commissioners to ascertain and determine the amount to be paid by the plaintiff to each person for his interest in the property sought to be appropriated for use as such underground natural gas storage reservoir, and/or as the annual rental for the use of such underground gas storage reservoir and for the use of so much of the surface as is required in the operation of the said underground gas storage reservoir, and for the use in connection with the creation, operation and maintenance thereof, and for all the native gas contained in said reservoir as compensation and damages by reason of the appropriation of such property; provided, however, the amount to be paid for such native gas and all thereof shall be no less than the market value of such gas.

The court shall appoint three (3) persons, qualified as experts and recommended as such by the board of oil and gas conservation, to assist and advise the commissioners in determining the compensation and damages to be paid by plaintiff to each person for his interest in the property sought to be appropriated and the fees and expenses of such persons shall be chargeable as costs of the proceedings to be paid by the plaintiff.

**History:** Ap. p. Sec. 589, p. 193, L. 1877; re-en. Sec. 589, 1st Div. Rev. Stat. 1879; re-en. Sec. 607, 1st Div. Comp. Stat. 1887; amd. Sec. 2220, C. Civ. Proc. 1895; re-en. Sec. 7340, Rev. C. 1907; re-en. Sec. 9943, R. C. M. 1921; amd. Sec. 4, Ch. 245, L. 1953; amd. Sec. 10, Ch. 259, L. 1955; amd. Sec. 3, Ch. 234, L. 1961; amd. Sec. 207, Ch. 253, L. 1974. Cal. C. Civ. Proc. Sec. 1247.

struction plans such structures as would allow two lane access across county road; but district court did not have power to require state to submit such plans to court for its approval since such matters were within purview of activities of highway commission. State ex rel. State Highway Commission v. Lavoie, 155 M 39, 466 P 2d 594, distinguished in — M —, 496 P 2d 1136.

#### Amendments

The 1974 amendment substituted "board of oil and gas conservation" for "oil and gas conservation commission of the state of Montana" near the beginning of the final paragraph.

#### Repealing Clause

Section 208 of Ch. 253, Laws 1974 read "Sections 28-101, 28-102, 28-107, 28-126, 28-132, 28-409, 46-2303 through 46-2306, 46-2319, 46-2328, 60-125, 60-137, 60-138, 60-146, 60-147, 81-1401.1, 81-1401.2, 81-1403, 81-1505, 82-3001 through 82-3003, 82A-1502 through 82A-1506, 82A-1507.1, 82A-1510, 82A-1511, 82A-1512, 89-103, 89-103.1, 89-103.3, 89-103.4, 89-103.5, 89-103.6, 89-103.8, 89-107, 89-108, 89-126, 89-129 through 89-139, 89-311, 89-827, and 89-828 are repealed."

#### Access Rights

In condemnation proceeding involving access to portion of farm divided by interstate highway, district court had power to require state to incorporate in its con-

#### Necessity of Use

Before district court may order condemnation, this section requires that it must find that proposed taking is necessary to public use under circumstances of individual case. Montana Power Co. v. Bokma, 153 M 390, 457 P 2d 769.

#### Underpass

Where 40.89 acres of ranch land were taken by the state highway commission as a right of way for an interstate highway, consisting of four lanes in width and fully controlled access, which split the remaining land into two divisions, leaving 432.69 acres, on which farm headquarters was located, on the north side of the highway and 393.42 acres on the south side of the highway, trial court in its preliminary order of condemnation properly ordered the commission to construct and maintain at its own expense an underpass leading from one side of the highway to the other. State ex rel. State Highway Commission v. Wheeler, 148 M 246, 419 P 2d 492, 496.

93-9912. (9944) **Appointment and meeting of commissioners.** Immediately upon making and entering the preliminary condemnation order the judge must meet with the respective parties, or their attorneys of record, for the purpose of appointing condemnation commissioners to ascertain and determine the amount to be paid by the plaintiff to each owner or other persons interested in such property by reason of the appropriation of such property. The court must thereupon appoint three (3) qualified, disinterested condemnation commissioners. One of such commissioners shall be nominated by the party or parties plaintiff; one of such commissioners shall be nominated by the party or parties defendant. The third commissioner shall be the chairman and shall be nominated by the two (2) commissioners previously nominated, provided, however, that if said two (2) commissioners fail to make such choice at the time of their appointment, then such nomination shall be made by the presiding judge. Each commissioner shall possess the following qualifications: a citizen of the United States and over eighteen (18) years of age; that he is not more than seventy (70) years of age; that he is in possession of natural faculties, of ordinary intelligence and not decrepit; that he is possessed of sufficient knowledge of the English language; that he was assessed on the last assessment roll of a county within the judicial district in which the action is pending; that he has not been convicted of malfeasance in office, or any felony or other high crime; that he is not related within the sixth degree to any party; that he does not stand in the relation of guardian and ward, master and servant, debtor and creditor, or principal and agent, or partner or surety as to any party. At the time of such meeting and nominations there shall be filed with the court by each nominating party or judge an affidavit of the person so nominated stating substantially as follows: that he has formed no unqualified opinion or belief as to the compensation to be awarded in the proceeding or as to the fairness or unfairness of the plaintiff's offer for the lands and improvements of the defendants; and that he has no enmity against or bias in favor of any party and has not discussed, communicated or overheard or read any discussion or communication from any party relating to values of the lands in question or the compensation offered, demanded or to be awarded; that if selected as a condemnation commissioner he is willing to serve and will well and truly try the issues of compensation and a true decision render according to the evidence and in compliance with the instructions of the court; that he will not discuss the case with anyone except the other commissioners until a decision has been filed with the court.

Immediately upon such nomination and appointment of commissioners the same shall proceed to meet at the time and place stated in the order appointing them, which time shall be not more than ten (10) days after the order of appointing, and proceed to examine the lands sought to be appropriated. At a time appointed by the judge and within said ten (10) day period they shall hear the allegations and evidence of all persons interested in each of the several parcels of land. Such hearing shall be attended by, and presided over by, the presiding judge who shall make all necessary rulings upon procedure and the admissibility of evidence. At



the conclusion of the aforesaid hearing, the court or judge shall instruct the commissioners as to the law applicable to their deliberations and shall instruct them that their duty is to determine, solely upon the basis of said examination of lands, the evidence produced at the hearing or hearings and the instructions of the court, the following:

1. to 4. \* \* \* [Same as parent volume.]

5. Where there are two (2) or more estates or divided interests in property sought to be condemned, the plaintiff is entitled to have the amount of the award, for said property first determined, as hereinbefore stated, as between plaintiff and all defendants claiming any interests therein; thereafter in the same proceeding the respective rights of each of such defendants in and to the award shall be determined by the commissioners, under supervision and instruction of the court, and the award apportioned accordingly.

**History:** En. Sec. 608, 1st Div. Comp. Stat. 1887; amd. Sec. 1, p. 269, L. 1891; amd. Sec. 2221, C. Civ. Proc. 1895; re-en. Sec. 7341, Rev. C. 1907; re-en. Sec. 9944, R. C. M. 1921; amd. Sec. 4, Ch. 234, L. 1961; amd. Sec. 19, Ch. 423, L. 1971. Cal. C. Civ. Proc. Sec. 1248.

#### Amendments

The 1971 amendment reduced the minimum age specified in the fifth sentence of the first paragraph from 21 to 18 years, and made minor changes in style.

#### Apportionment of Damages

It was not error for the jury to express its award of damages separately to lessor and lessee rather than state a single lump sum when such award was not excessive, was supported by substantial evidence, and did not reflect an increased valuation due solely to a distribution of interest. *State Highway Commission v. City Service Co.*, 142 M 559, 385 P 2d 604, distinguished in *State Highway Commission v. Barnes*, 151 M 300, 443 P 2d 16.

#### Expert Testimony as to Value

Testimony of expert witnesses showing that although presently used for agricultural purposes, highest and best use of land was for residential subdivision, showing comparative values of similar land in same geographical area, and showing how property could have been subdivided and how highway running through it detracted from its suitability for subdivision, was sufficient to sustain jury's verdict as against contention of state that expert witnesses based their opinions on mere speculation. *Montana State Highway Commission v. Jacobs*, 150 M 322, 435 P 2d 274, explained in 155 M 176, 183, 468 P 2d 749.

#### Lack of Certainty

In action for condemnation where none of the witnesses agreed as to the exact

amount of acreage to be taken, and the engineers did not have all of the facts and figures so as to enable counsel to be exact, the cause was remanded for a new trial. *State Highway Commission v. Marsh*, — M —, 527 P 2d 573.

#### Lessee's Testimony

In condemnation action court properly permitted testimony of lessee for the purpose of showing how the operation of the ranch would be affected, but refused to allow testimony as to lessee's damage, since the fact of lessee's loss had not been offered in evidence and the lease provided that any condemnation award would go to the owner. *State Highway Commission v. Marsh*, — M —, 527 P 2d 573.

#### Measurement of Damages

Where jury in condemnation action awarded damages for land taken in excess of amount requested by landowner and testified to by expert appraisers, trial court properly granted a new trial notwithstanding fact that total award was equal to amount sought by landowner as total damages. *State Highway Commission v. Emery*, 156 M 507, 481 P 2d 686.

Once proper foundation has been laid as to the witness's expertise, he should be permitted to give his opinion using any of the accepted means of calculating value, such as market data, reproduction costs, or income capitalization. *State, Department of Highways v. Olsen*, — M —, 531 P 2d 1330.

Just compensation for a public taking of private land is to be computed as follows: the fair market value of the land taken, plus value of remainder before taking minus value of remainder after taking. *Meagher County Newlan Creek Water District v. Walter*, — M —, 547 P 2d 850.

### Measure of Damages—Leasehold Interests

The proper value of a leasehold interest is the fair market value not the market value less future rent to be paid. *State Highway Commission v. City Service Co.*, 142 M 559, 385 P 2d 604.

### Noncontiguous Lands

Although the general rule in eminent domain proceedings requires that the land for which depreciation damages are sought be contiguous to that from which severance is made, the landowner may claim, as an exception to the general rule, that the unity of use within an integrated operation to which he applies noncontiguous lands is of such a character that after severance they cannot be fully utilized to their best and most valuable use; where highway right of way traversed a tract of ranch land so as to separate it into two parcels with no access for six and a half miles, court properly permitted testimony concerning damage to two other noncontiguous tracts used as a part of landowner's ranching operation. *State Highway Commission v. Renfro*, 161 M 251, 505 P 2d 403.

### Severance Damages

While it is proper for the trial court to determine whether there has been an impairment of access, the question of the extent to which access has been impaired is for the jury, and it was not error for the court to refuse to give instructions to the effect that all means of access to the

defendant's property had been destroyed. *State Highway Commission v. Manry*, 143 M 382, 390 P 2d 97.

To determine what is "remainder" of property taken under statute providing for damages for depreciation in value of portion of land not sought to be condemned, there are generally three tests: (1) unity of ownership, (2) contiguity, (3) unity of use; claimant who conveyed part of tract of subsequently condemned land to corporation was not entitled to compensation for depreciation in value to land he still held because claimant and corporation were two distinct owners and hence unity of ownership was absent even though claimant was majority shareholder of corporation and lands were contiguous. *Montana State Highway Commission v. Robertson & Blossom Inc.*, 151 M 205, 441 P 2d 181, distinguished in — M —, 505 P 2d 403.

### Valuation of Property

An owner of real property shall be qualified to estimate in a reasonable way the value of his property for the use to which he has been putting it. *State Highway Commission v. Marsh*, — M —, 527 P 2d 573.

### Verdict Form

It was not prejudicial error for the trial judge to give the jury a verdict form which was in accord with this section and which verdict was not out of proportion to the damage done the defendant. *State Highway Commission v. Manry*, 143 M 382, 390 P 2d 97.

93-9913. (9945) The date with respect to which compensation shall be assessed. For the purpose of assessing compensation the right thereto shall be deemed to have accrued at the date of the service of the summons, and its actual value as of that date shall be the measure of compensation for all property to be actually taken, and the basis of depreciation in value of property not actually taken, but injuriously affected. This shall not be construed to limit the amount of compensation payable by the department of highways under the provisions of any legislation enacted pursuant to the Federal Highway Beautification Act of 1965. If an order be made letting the plaintiff into possession, as provided in section 93-9920, the full amount finally awarded shall draw interest at the rate of ten per cent (10%) per annum from the date on which the property owner surrenders possession of the property in accordance with the terms of such order to the earlier of the following dates:

(a) The date on which the right to appeal to the Montana supreme court expires, or if appeal is filed, to the date of final decision by the supreme court, or

(b) The date on which the property owner withdraws from court the full amount finally awarded.



If the property owner withdraws from court a fraction of the amount finally awarded, interest on such fraction shall cease on the date it is withdrawn but interest on the remainder of the amount finally awarded shall continue to the earlier of the aforesaid dates defined in (a) and (b) of this section until the full amount is withdrawn from the court. None of the amount finally awarded shall draw interest after the date on which the right to appeal to the Montana supreme court expires. No improvements put upon the property, subsequent to the date of the service of summons, shall be included in the assessment of compensation or depreciation in value, nor shall the same be used as the basis of computing such compensation or depreciation.

**History:** En. Sec. 591, p. 194, L. 1877; re-en. Sec. 591, 1st Div. Rev. Stat. 1879; re-en. Sec. 609, 1st Div. Comp. Stat. 1887; amd. Sec. 2222, C. Civ. Proc. 1895; re-en. Sec. 7342, Rev. C. 1907; re-en. Sec. 9945, R. C. M. 1921; amd. Sec. 1, Ch. 133, L. 1957; amd. Sec. 5, Ch. 234, L. 1961; amd. Sec. 1, Ch. 182, L. 1965; amd. Sec. 1, Ch. 187, L. 1967; amd. Sec. 12, Ch. 212, L. 1969; amd. Sec. 208, Ch. 316, L. 1974; amd. Sec. 1, Ch. 534, L. 1975. Cal. C. Civ. Proc. Sec. 1249.

### Compiler's Notes

The Federal Highway Beautification Act of 1965, referred to in the first paragraph of this section, is compiled in the United States Code as Tit. 23, secs. 131, 136 and 319.

### Amendments

The 1965 amendment divided the section into paragraphs; substituted "full amount finally awarded" for "amount awarded" before "shall draw lawful interest" in the third sentence of the first paragraph; substituted "earlier of the following dates" and clauses (a) and (b) at the end of the first paragraph for "date of receipt of the award or any portion thereof"; and substituted the first two sentences of the final paragraph for "provided, however, that interest shall not be allowed or paid on so much thereof as shall have been paid to the landowner involved or withdrawn by such landowner from the court."

The 1967 amendment added to the first sentence of the initial paragraph, "and the reasonable cost of removal of all necessary personal property from the condemned real property within a reasonable distance in the area, not to exceed the sum of six thousand dollars (\$6,000) in the case of a business, farm or ranch relocation, and not to exceed the sum of four hundred dollars (\$400) in any other case"; inserted the second sentence; and, at the end of subparagraph (a), added "if appeal is filed to the date of final decision by the supreme court, or."

The 1969 amendment deleted the provi-

sion, inserted by the 1967 amendment, concerning removal of personality.

The 1974 amendment substituted "department of highways" for "state highway commission" in the second sentence of the first paragraph.

The 1975 amendment substituted "interest at the rate of ten per cent (10%) per annum" for "lawful interest" in the third sentence of the first paragraph; and added "until the full amount is withdrawn from the court" at the end of the first sentence of the final paragraph.

### Separability Clause

Section 2 of Ch. 182, Laws 1965 read "If any section, paragraph, sentence, clause or provision of this act shall for any reason be held invalid or unenforceable, the invalidity or unenforceability thereof shall not affect any of the remaining sections, paragraphs, sentences, clauses or provisions of this act."

### Repealing Clauses

Section 3 of Ch. 182, Laws 1965 read "All acts, or parts thereof, inconsistent herewith are hereby repealed to the extent only of such inconsistency. This repealer shall not be construed to revive any act or part thereof, heretofore repealed."

Section 209 of Ch. 316, Laws 1974 read "Sections 32-101, 32-391, 32-315, 32-414, 32-417, 32-508, 32-527, 32-712, 32-716, 32-1001, 32-1117, 32-1118, 32-1120, 32-1121, 32-1122, 32-1123, 32-1127, 32-1129, 32-1401, 32-1619, 32-2403, 32-2405, 32-2417, 32-2418, 32-2501 through 32-2503, 32-2701 through 32-2716, 32-3501 through 32-3509, 32-3919, 32-3921, 32-3922, 32-4402, 53-703, 82A-702, 82A-703, and 82A-705 through 82A-708, R. C. M. 1947, are repealed."

### Effective Date

Section 4 of Ch. 182, Laws 1965 provided the act should be in effect from and after its passage and approval. Approved March 4, 1965.

### Appeal

In eminent domain proceedings the



findings of the district court will generally not be disturbed on appeal unless they are so obviously and palpably out of proportion to the injury done as to be in excess of just compensation provided for by section 14, article III of the Montana constitution. *State Highway Commission v. Woodcock*, 147 M 291, 411 P 2d 357.

#### Assessment of Compensation

Where condemnee's house was between 50 and 60 years old and had been converted into a multiple family dwelling, court did not err in excluding evidence of reconstruction costs or comparable sales elsewhere in determining value of the property since there was no way of determining depreciation of the old house in arriving at reconstruction cost figures, nor were there sufficient comparable sales in the area. *State Highway Commission v. Tubbs*, 147 M 296, 411 P 2d 739.

#### Commercial Use

Where state highway commission in order to show public access to highway presented two appraisal witnesses to show that there was access at a certain exit in which case there would be no loss of commercial usefulness, it was quite proper and necessary to rebut this testimony and to let the jury know the type of easement provided for the access exit. *State ex rel. State Highway Commission v. Wheeler*, 148 M 246, 419 P 2d 492, 498.

#### Cost of Moving Personal Property

Where friends of condemnees gratuitously aided them in moving personal property from condemned realty, condemnees were not entitled to recover the costs of their friends' labor as an element of damages. *State Highway Commission v. Manry*, 143 M 382, 390 P 2d 97.

#### Depreciation on Inventory

This section requires the state to pay for any damage to personal property removed from condemned land including any depreciation in the inventory value of such property. *State Highway Commission v. City Service Co.*, 142 M 559, 385 P 2d 604.

#### Improvements

In eminent domain proceeding trial court did not err in excluding evidence

concerning improvement of sole access road to ranch property remaining after state highway commission had taken part of the property for right of way for interstate highway, where any changes in access were made after the date of service of the summons in the condemnation action. *State ex rel. State Highway Commission v. Wheeler*, 148 M 246, 419 P 2d 492, 497.

#### Interest on Award

Judgment allowing interest from the date of the preliminary order of condemnation was erroneous and should allow interest only from the date of the order granting the condemnor possession of the property. *Department of Highways v. Hy-Grade Auto Court*, — M —, 546 P 2d 1050.

#### Market Value

The proper value of a leasehold interest is the fair market value not the market value less future rent to be paid. *State Highway Commission v. City Service Co.*, 142 M 559, 385 P 2d 604.

Where state not only took part of plaintiff's land, but also eliminated an old channel of water and diked up a new channel, thus creating a flood basin on plaintiff's land, evidence of actual results of taking was proper, even though land values are usually measured as of the date of summons. *State Highway Commission v. Biastoch Meats, Inc.*, 145 M 261, 400 P 2d 274.

When there is a market for the type of property being condemned, and the property has no other intrinsic value, courts will adopt a market value in determining the actual value of the property, which is nothing more than the price resulting from fair negotiations between a willing seller and buyer. *State Highway Commission v. Tubbs*, 147 M 296, 411 P 2d 739.

Where actual value as determined by jury is based on credible testimony as to market value of highest and best use for which land is available, the verdict and judgment will not be set aside. *State Highway Commission v. Vaughan*, 155 M 277, 470 P 2d 967.

#### References

*State Highway Commission v. Churchill*, 146 M 52, 403 P 2d 751.

### 93-9915. (9947) Appeal from assessment of commissioners.

#### Apportionment of Damages

It was not error for the jury to express its award of damages separately to lessor and lessee rather than state a single lump sum when such award was not excessive, was supported by substantial evidence, and did not reflect an increased valuation

due solely to a distribution of title. *State Highway Commission v. City Service Co.*, 142 M 559, 385 P 2d 604, distinguished in *State Highway Commission v. Barnes*, 151 M 300, 443 P 2d 16.

The requirement of 93-9912 that the entire award be determined first and then

allocated between respective defendants is applicable to jury awards under this section, but, where the jury was instructed to first determine the total award and then apportion it in a single proceeding and the

jury did so in a single verdict, there was no error in the absence of a showing of prejudice or excessiveness. *Department of Highways v. Hy-Grade Auto Court*, — M —, 546 P 2d 1050.

### 93-9917. (9949) Payment of damages or deposit of bond therefor.

#### Delay in Payment of Damages

In eminent domain proceedings where the state highway commission did not move within thirty days as required by this section, it could not excuse its failure

to pay by alleging that it had no notice of the entry of judgment when the commission itself had caused the judgment to be entered. *Robertson v. State Highway Commission*, 148 M 275, 420 P 2d 21, 24.

### 93-9918. (9950) Damages—to whom paid.

#### Delay in Payment of Damages

In eminent domain proceeding where the state highway commission did not move within thirty days as required by section 93-9917, it could not excuse its failure to pay by alleging that it had no notice of the entry of the judgment when the commission itself had caused the judgment to be entered. *Robertson v. State Highway Commission*, 148 M 275, 420 P 2d 21, 24.

#### Stay of Execution

Where state highway commission filed notice of appeal and perfected their appeal after writ of execution under this section had issued, the appeal stayed the judgment although no bond was filed as required by section 93-8011 since under Rule 62(e), no security was required from the state. *Robertson v. State Highway Commission*, 148 M 275, 420 P 2d 21, 24.

### 93-9920. (9952) Putting plaintiff in possession.

#### References

*State Highway Commission v. Schmidt*, 143 M 505, 391 P 2d 692 (concurring

opinion); *State Highway Commission v. Churchwell*, 146 M 52, 403 P 2d 751.

### 93-9921. (9953) Repealed.

#### Repeal

Section 93-9921 (Sec. 597, p. 195, L. 1877), relating to allowance and appor-

tionment of costs, was repealed by Sec. 2, Ch. 453, Laws 1973. For new law, see sec. 93-9921.1.

**93-9921.1. Necessary expenses of litigation.** The condemnor, shall within thirty (30) days after an appeal is perfected from the commissioner's award or report, submit to condemnnee a written final offer of judgment for the property to be condemned, together with necessary expenses of condemnnee then accrued.

If at any time prior to ten (10) days before trial, the condemnnee serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon judgment shall be entered. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible at the trial except in a proceeding to determine costs. The fact that an offer is made but not accepted does not preclude a subsequent offer. In the event of litigation, and when the private property owner prevails, by receiving an award in excess of the final offer of the condemnor, the court shall award necessary expenses of litigation to the condemnnee.

**History:** En. 93-9921.1 by Sec. 1, Ch. 453, L. 1973.

private property owner prevails; repealing section 93-9921, R. C. M. 1947.

#### Title of Act

An act implementing article II, section 29 of the 1972 Montana constitution, by providing for an award including necessary expenses of litigation when the pri-

#### Repealing Clause

Section 2 of Ch. 453, Laws 1973 read "Section 93-9921, R. C. M. 1947, is repealed."

**Attorney and Witness Fees**

Right to necessary costs of litigation arises only after private property owner secures a verdict higher than the state's final offer, and thus award of litigation

costs was proper for case filed before enactment of this law, but decided after law was in effect. State, Department of Highways v. Olsen, — M —, 531 P 2d 1330.

**93-9921.2. Necessary expenses of litigation.** (1) Necessary expenses of litigation as authorized by 93-9921.1 mean reasonable and necessary attorney fees, expert witness fees, exhibit costs, and court costs.

(2) Reasonable and necessary attorney fees are the customary hourly rates for an attorney's services in the county in which trial is held. Reasonable and necessary attorney fees shall be computed on an hourly basis and may not be computed on the basis of any contingent fee contract entered into after July 1, 1977.

(3) Reasonable and necessary expert witness fees may not exceed the customary rate for the services of a witness of such expertise in the county in which trial is held.

**History:** En. 93-9921.2 by Sec. 1, Ch. 48, L. 1977.

for computing the amount of necessary expenses of litigation required by section 93-9921.1, R. C. M. 1947.

**Title of Act**

An act to define and provide a manner

**93-9923. (9955) Private roads.****Implied Reserved Easement of Necessity**

Where all witnesses agreed that there was no visible sign of a roadway or path over defendant's property at the time when plaintiff bought the adjoining property, there could have been no implied reserved easement for the roadway. Godfrey v. Pilon, — M —, 529 P 2d 1372.

**Necessity of Easement**

The necessity of an easement to landlocked parcel of real property must appear at the time of the conveyance of the property, and where grantor conveyed a tract of land to plaintiff but retained other land over which plaintiff could have made entry, there was no necessity for easement over land of a third party. Godfrey v. Pilon, — M —, 529 P 2d 1372.

**93-9927. Relocation assistance—purpose of act.** It is the purpose of this act to provide for uniform and equitable treatment of persons displaced from their homes, businesses, or farms as a result of federally assisted programs, to establish uniform and equitable land acquisition policies for federally assisted programs and to comply with the federal "Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970."

**History:** En. Sec. 1, Ch. 3, 2nd Ex. L. 1971.

assistance to persons displaced as a result of acquisition of land for federally assisted programs and to provide for acquisition practices.

**Title of Act**

An act to provide for relocation as-

**93-9928. Definition of terms in relocation assistance law.** As used in this act, unless the context otherwise requires:

(1) "Agency" means the state of Montana, a political subdivision of the state or any department, agency or instrumentality of the state of Montana or of a political subdivision of the state.

(2) "Average annual net earnings" means one-half ( $\frac{1}{2}$ ) of any net earnings of a business or farm operation, before federal and state income



taxes, during the two taxable years immediately preceding the taxable year in which such business or farm operation moves from real property acquired for a project of an agency (for which federal financial assistance is available to pay all or any part of the cost) or during such other period as the acquiring agency determines to be more equitable for establishing such earnings, and includes any compensation paid by the business or farm operation to the owner, his spouse, or his dependents during such period.

(3) "Business" means any lawful activity, excepting a farm operation, conducted primarily:

(a) for the purchase, sale, lease and rental of personal and real property, and for the manufacture, processing, or marketing of products, commodities, or any other personal property;

(b) for the sale of services to the public;

(c) by a nonprofit organization; or

(d) solely for the purposes of section 3 [93-9929] (1) of this act, for assisting in the purchase, sale, resale, manufacture, processing, or marketing of products, commodities, personal property, or services by the erection and maintenance of an outdoor advertising display or displays, whether or not such display or displays are located on the premises on which any of the above activities are conducted.

(4) "Displaced person" means any person who, on or after the effective date of this act, moves from real property, or moves his personal property from real property, as a result of the acquisition of such real property, in whole or in part, or as the result of the written order of an acquiring agency to vacate real property, for a program or project undertaken by the agency, for which federal financial assistance will be available to pay all or any part of the cost; and solely for the purposes of section 3 [93-9929] (1) and (2) and section 6 [93-9932] of this act, as a result of the acquisition of, or as the result of the written order of, the acquiring agency to vacate other real property, on which such person conducts a business or farm operation, for such program or project. The term "displaced person" also includes a person who moves or discontinues his business or moves other personal property, or moves from his dwelling as the direct result of code enforcement activities, or a program of rehabilitation of buildings conducted pursuant to a federal program.

(5) "Federal act" means the "Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970" or as that act may be amended.

(6) "Federal financial assistance" means a grant, loan, or contribution provided by the United States except any federal guarantee or insurance.

(7) "Farm operation" means any activity conducted solely or primarily for the production of one (1) or more agricultural products or commodities, including timber, for sale or home use, and customarily producing such products or commodities in sufficient quantity to be capable of contributing materially to the operator's support.

(8) "Person" means any individual, partnership, corporation or association.

History: En. Sec. 2, Ch. 3, 2nd Ex.  
L. 1971.

**93-9929. Payments to displaced persons—moving expense allowance—business losses.** (1) Whenever the acquisition of real property for a program or project of an agency (for which federal financial assistance is available to pay all or any part of the cost) will result in the displacement of any person, the agency shall make payment to the displaced person, upon application as approved by the agency, for:

(a) actual reasonable expenses in moving himself, his family, business, farm operation, or other personal property;

(b) actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property, as determined by the agency; and

(c) actual reasonable expenses in searching for a replacement business or farm.

(2) In lieu of payments for actual expenses and losses under subsection (1) of this section a person who is displaced from a dwelling may elect to receive a moving expense allowance determined according to a schedule established by the agency and a dislocation allowance, neither of which may exceed the maximum allowances under section 202 (b) of the federal act.

(3) In lieu of payments for actual expenses and losses under subsection (1) of this section a person who is displaced from his place of business or from his farm operation may receive a fixed payment in an amount equal to the average annual net earnings of the business or farm operation provided that:

(a) the payment shall not be less nor more than the amounts set forth in section 202 (c) of the federal act;

(b) in the case of a business no payment shall be made under this subsection unless the acquiring agency is satisfied that the business cannot be relocated without a substantial loss of its existing patronage and is not a part of a commercial enterprise having at least one (1) other establishment not being acquired by an agency, which is engaged in the same or similar business.

**History: En. Sec. 3, Ch. 3, 2nd Ex. L. 1971.**

**93-9930. Additional payments for displacement from dwelling owned by occupant.** (1) In addition to payments otherwise authorized by this act, the acquiring agency shall make an additional payment to any displaced person who is displaced from a dwelling actually owned and occupied by such displaced person for not less than one hundred and eighty (180) days prior to the initiation of negotiations for the acquisition of the property. The additional payment shall include the following elements:

(a) the amount may not exceed the amount allowed under section 203 of the federal act,

(b) the amount, if any, which when added to the acquisition cost of the dwelling acquired by the agency, equals the reasonable cost of a comparable replacement dwelling which is a decent, safe, and sanitary dwelling adequate to accommodate such displaced person, reasonably accessible to public services and places of employment and available on the private

market. All determinations required to carry out this subsection (b) shall be made in accordance with regulations issued by the acquiring agency.

(c) the amount, if any, which will compensate the displaced person for any increased interest costs which the person is required to pay for financing the acquisition of any comparable replacement dwelling. The amount shall be paid only if the dwelling acquired by the agency was encumbered by a bona fide mortgage which was a valid lien on such dwelling for not less than one hundred and eighty (180) days prior to the initiation of negotiations for the acquisition of the dwelling. The amount shall be equal to the excess in the aggregate interest and other debt service costs of that amount of the principal of the mortgage on the replacement dwelling which is equal to the unpaid balance of the mortgage on the acquired dwelling, over the remainder term of the mortgage on the acquired dwelling, reduced to discounted present value. The discount rate shall be the prevailing interest rate paid on savings deposits by commercial banks in the general area in which the replacement dwelling is located.

(d) reasonable expenses incurred by the displaced person for evidence of title, recording fees, and other closing costs incident to the purchase of the replacement dwelling, but not including prepaid expenses.

(2) The additional payment authorized by this section shall be made only to a displaced person who purchases and occupies a replacement dwelling which is decent, safe, and sanitary not later than the end of the one (1) year period beginning on the date on which he received from the agency final payment of all costs of the acquired dwelling, or on the date on which he moves from the acquired dwelling, whichever is the later date.

History: En. Sec. 4, Ch. 3, 2nd Ex.  
L. 1971.

**93-9931. Additional payments for displacement from rented dwelling.** In addition to amounts otherwise authorized by this act the acquiring agency shall make a payment to or for any displaced person displaced from any dwelling not eligible to receive a payment under section 4 [93-9930] of this act if the dwelling was actually and lawfully occupied by the displaced person for not less than ninety (90) days prior to the initiation of negotiations for acquisition of such dwelling. The payment shall be either:

(1) the amount necessary to enable the displaced person to lease or rent for a period not to exceed four (4) years, a decent, safe, and sanitary dwelling of standards adequate to accommodate such person in areas not generally less desirable in regard to public utilities and public and commercial facilities, and reasonably accessible to his place of employment, but not to exceed the amount allowable under section 204 of the federal act; or

(2) the amount necessary to enable such person to make a down payment (including reasonable expenses for evidence of title, recording fees, and other closing costs incident to the purchase of a dwelling, but not including prepaid expenses) on the purchase of a decent, safe, and sanitary dwelling of standards adequate to accommodate such person in areas not



generally less desirable in regard to public utilities and public and commercial facilities. The amount payable under this subsection (2) shall not exceed the amount allowable under section 204 of the federal act and shall be subject to the same matching requirements as under said section.

**History:** En. Sec. 5, Ch. 3, 2nd Ex.  
L. 1971.

**93-9932. Relocation advisory services.** (1) Whenever the acquisition of real property for a program or project of an agency (for which federal financial assistance is available to pay all or any part of the cost) will result in the displacement of any person, the agency shall provide a relocation assistance advisory program for displaced persons which offers the services described in this section. If the acquiring agency determines that any person occupying property immediately adjacent to the real property acquired is caused substantial economic injury because of the acquisition, he may offer such person relocation advisory services.

(2) The relocation advisory service may include such budget, debt management and related counseling services as the acquiring agency determines will assist the displaced person. The relocation assistance program shall include such measures, facilities, or services as may be necessary or appropriate in order to:

(a) determine the need, if any, of displaced persons, for relocation assistance;

(b) provide current and continuing information on the availability, prices, and rentals of comparable decent, safe, and sanitary sales and rental housing, and of comparable commercial properties and locations for displaced businesses;

(c) assist a displaced person displaced from his business or farm operation in obtaining and becoming established in a suitable replacement location;

(d) supply information concerning federal and state housing programs, disaster loan programs and other federal or state programs offering assistance to displaced persons; and

(e) provide other advisory services to displaced persons in order to minimize hardships to displaced persons in adjusting to relocation;

(f) secure the co-ordination of relocation activities with other project activities and other planned or proposed federal or state actions in the community or nearby areas which may affect the relocation program.

(3) In order to prevent unnecessary expenses and duplication of functions and to promote uniform and effective administration of relocation assistance programs, an agency may enter into contracts with any individual, firm, association, or corporation for services in connection with such programs, or may carry out its functions under this act through any federal or state agency having an established organization for conducting relocation assistance programs. Each agency whenever practicable, shall utilize the services of state or local housing agencies, or other agencies having experience in the administration or conduct of similar housing assistance activities.

**History:** En. Sec. 6, Ch. 3, 2nd Ex.  
L. 1971.

**93-9933. Assurance of availability of suitable replacement dwellings.** Whenever the acquisition of real property for a program or project of an agency (for which federal financial assistance is available to pay all or any part of the cost) will result in the displacement of any person, the agency shall assure that, within a reasonable period of time, prior to displacement there will be available in areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families and individuals displaced, decent, safe, and sanitary dwellings, as defined by the federal agency concerned with administering the federal financial assistance, equal in number to the number of and available to such displaced persons who require such dwellings and reasonably accessible to their places of employment.

**History: En. Sec. 7, Ch. 3, 2nd Ex.**  
**L. 1971.**

**93-9934. Relocation costs included in project costs—replacement housing.** The acquiring agency shall include the cost of providing payments and assistance under the provisions of this act in the cost of any project for which federal financial assistance is available to pay all or any part of the cost. The acquiring agency shall also provide the payments and assistance and assure the availability of replacement housing for displaced persons who are displaced as a result of real property being acquired by an agency and furnished as a required contribution incident to a federal program or project.

**History: En. Sec. 8, Ch. 3, 2nd Ex.**  
**L. 1971.**

**93-9935. Public assistance eligibility unimpaired—tax exemption of payments.** No payment received by a displaced person under this act shall be considered as income or resources for the purpose of determining the eligibility of any person for assistance under any state law or for the purposes of determining income under state tax laws.

**History: En. Sec. 9, Ch. 3, 2nd Ex.**  
**L. 1971.**

**93-9936. Appeal to district court from administrative determination.** Any person aggrieved by final administrative determination concerning eligibility for relocation payments authorized by this act may appeal such determination to the district court of the county in which the land acquired is located.

**History: En. Sec. 10, Ch. 3, 2nd Ex.**  
**L. 1971.**

**93-9937. Appraisal and negotiation policies—time allowed to move—condemnation proceedings.** An agency which acquires real property for a program or project for which federal financial assistance will be available to pay all or any part of the cost of such program or project shall comply with the following policies:

(1) The agency shall make every reasonable effort to acquire expeditiously real property by negotiation.

(2) Real property shall be appraised before the initiation of negotiations, and the owner or his designated representative shall be given an opportunity to accompany the appraiser during his inspection of the property.

(3) Before the initiation of negotiations for real property, an amount shall be established which it is reasonably believed is just compensation therefor and such amount shall be offered for the property. In no event shall such amount be less than the approved appraisal of the fair market value of such property. Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, shall be disregarded in determining the compensation for the property. The owner of the real property to be acquired shall be provided with a written statement of, and summary of the basis for, the amount established as just compensation. Where appropriate, the just compensation for the real property acquired and for damages to remaining real property shall be separately stated.

(4) No owner shall be required to surrender possession of real property before the agreed purchase price is paid or before there is deposited with the court, in accordance with applicable law, for the benefit of the owner, an amount not less than the approved appraisal of the fair market value of such property, or the amount of the award of compensation in the condemnation proceeding of such property.

(5) The construction or development of a program or project for which federal financial assistance will be available to pay all or any part of the cost of the program or project shall be so scheduled that, to the greatest extent practicable, no person lawfully occupying real property shall be required to move from a dwelling (assuming a replacement dwelling will be available) or to move his business or farm operation without at least ninety (90) days' written notice of the date by which such move is required.

(6) If an owner or tenant is permitted to occupy the real property acquired on a rental basis for a short term or for a period subject to termination by the acquiring agency on short notice, the amount of rent required shall not exceed the fair rental value of the property to a short-term occupier.

(7) In no event shall the time of condemnation be advanced, or negotiations or condemnation and the deposit of funds in court for the use of the owner be deferred, or any other action coercive in nature be taken to compel an agreement on the price to be paid for the property.

(8) If an interest in real property is to be acquired by exercise of the power of eminent domain, formal condemnation proceedings shall be instituted. The acquiring agency shall not intentionally make it necessary



for an owner to institute legal proceedings to prove the fact of the taking of his real property.

(9) If the acquisition of only part of the property would leave its owner with an uneconomic remnant, an offer to acquire the entire property shall be made.

**History:** En. Sec. 11, Ch. 3, 2nd Ex.  
L. 1971.

**93-9938. Advancement of closing costs and taxes incurred by owner.** Any agency acquiring real property for a program or project for which federal financial assistance will be available to pay all or any part of the cost of the program or project shall, as soon as practicable after the date of payment of the purchase price or the date of deposit into court of funds to satisfy the award of compensation in a condemnation proceeding to acquire real property, whichever is the earlier, reimburse the owner, to the extent the acquiring agency deems fair and reasonable, for expenses he necessarily incurred for recording fees, transfer taxes, and similar expenses incidental to conveying such real property to the acquiring agency; penalty costs for prepayment for any pre-existing recorded mortgage or deed of trust entered into in good faith encumbering such real property; and the prorata portion of real property taxes paid which are allocable to a period subsequent to the date of vesting title in the acquiring agency, or the effective date of possession of such real property by the acquiring agency, whichever is the earlier.

**History:** En. Sec. 12, Ch. 3, 2nd Ex.  
L. 1971.

**93-9939. Reimbursement of costs when condemnation proceedings abandoned.** Where a condemnation proceeding is instituted by an agency to acquire real property for a program or project for which federal financial assistance is available, and the final judgment is that the real property cannot be acquired by condemnation or that the proceeding is abandoned, the owner of any right, title, or interest in such real property shall be paid such sum as will, in the opinion of the court, reimburse such owner for his reasonable attorney, appraisal, and engineering fees, actually incurred because of the condemnation proceedings. The award of such sums will be paid by the agency which sought to condemn the property.

**History:** En. Sec. 13, Ch. 3, 2nd Ex.  
L. 1971.

**93-9940. Expenses included in inverse condemnation judgment or settlement.** Where an inverse condemnation proceeding is instituted by the owner of any right, title, or interest in real property because of the alleged taking of his property for any program or project for which federal financial assistance will be available to pay all or any part of the cost of the program or project, the court, rendering a judgment for the plaintiff in such proceeding and awarding compensation for the taking of property, or attorney for the acquiring agency effecting a settlement of any such proceeding, shall determine and award or allow to such plaintiff, as a part of such judgment or settlement, such sum as will, in the opinion of the

court or such attorney, reimburse such plaintiff for his reasonable costs, disbursements, and expenses including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding.

**History:** En. Sec. 14, Ch. 3, 2nd Ex.  
L. 1971.

**93-9941. Acquisition of buildings and improvements affected—payments to tenant.** (1) Where any interest in real property is acquired for a program or project for which federal assistance will be available to pay all or any part of the cost of the program or project, the acquiring agency shall acquire an equal interest in all buildings, structures, or other improvements located upon the real property so acquired and which are required to be removed from such real property or which the acquiring agency determines will be adversely affected by the use to which such real property will be put.

(2) For the purpose of determining the just compensation to be paid for any building, structure, or other improvement required to be acquired by subsection (1) of this section, such building, structure, or other improvement shall be deemed to be a part of the real property to be acquired notwithstanding the right or obligation of a tenant, as against the owner of any other interest in the real property, to remove such building, structure, or improvement at the expiration of his term, and the fair market value which such building, structure, or improvement contributes to the fair market value of the real property to be acquired, or the fair market value of such building, structure, or improvement for removal from the real property, whichever is the greater, shall be paid to the tenant therefor.

Payment for such buildings, structures, or improvements as set forth in this subsection (2) shall not result in duplication of any payments otherwise authorized by state law. No such payment shall be made unless the owner of the land involved disclaims all interest in the improvements of the tenant. In consideration for any such payment the tenant shall assign, transfer, and release all his right, title, and interest in and to such improvements. Nothing in this subsection (2) shall be construed to deprive the tenant of any rights to reject payment and to obtain payment for such property interests in accordance with other laws of the state.

**History:** En. Sec. 15, Ch. 3, 2nd Ex.  
L. 1971.

**93-9942. Duplication of eminent domain payments not intended.** No payment or assistance provided for in this act shall be required to be made by an agency if the displaced person receives a payment required by the laws of eminent domain which is determined by the agency to have substantially the same purpose and effect as such payment under this act.

**History:** En. Sec. 16, Ch. 3, 2nd Ex.  
L. 1971.

**93-9943. New rights and powers not created.** (1) The provisions of section 7 [93-9933] of this act create no rights or liabilities and shall not affect the validity of any property acquisition by purchase or condemnation.

(2) Nothing in this act shall be construed as creating in any condemnation proceedings brought under the power of eminent domain any element of value or damage not in existence immediately prior to the effective date of this act.

(3) Nothing in this act shall be construed as, directly or indirectly, granting any new or additional power of eminent domain.

**History:** En. Sec. 17, Ch. 3, 2nd Ex.  
L. 1971.

**93-9944. Application to all federally assisted programs.** This act shall apply to all acquisitions of real property by an agency for a program or project for which federal financial assistance is available to pay all or any part of the cost.

**History:** En. Sec. 18, Ch. 3, 2nd Ex.  
L. 1971.

## CHAPTER 100—NAMES—CHANGE OF NAMES OF PERSONS —OF WATERCOURSES

Section 93-100-2. Application for change of name—how made.

**93-100-2. (9964) Application for change of name—how made.** All applications for change of names must be made to the district court of the county where the person whose name is proposed to be changed resides, by petition, signed by such person; and if such person is under eighteen (18) years of age, by one of the parents, if living, or if both be dead, then by the guardian; and if there be no guardian, then by some near relative or friend. The petition must specify the place of birth and residence of such person, his or her present name, the name proposed, and the reason for such change of name; and must, if neither parent of such person be living, name as far as known to the petitioner, the near relatives of such person, and their place of residence. Any religious, benevolent, literary, scientific corporation, or any corporation bearing or having for its name, or using or being known by the name of, any benevolent or charitable order or society, may, by petition, apply to the district court of the county in which its articles of incorporation were originally filed, or in which the property of such corporation is situated, for a change of its corporate name. Such petition must be signed by a majority of the directors or trustees of the corporation, and must specify the date of the formation of the corporation, the name proposed, and the reason for such change of name. Upon filing such petition on behalf of such corporation, the same proceedings shall be made as upon applications for changes of names of natural persons, and no banking corporation hereafter organized shall adopt or use the name of any other banking corporation or association, or of any friendly association.

**History:** En. Sec. 2261, C. Civ. Proc. 1895; re-en. Sec. 7361, Rev. C. 1907; amd. Sec. 1, Ch. 39, L. 1921; re-en. Sec. 9964, R. C. M. 1921; amd. Sec. 21, Ch. 240, L. 1971; amd. Sec. 33, Ch. 94, L. 1973; amd. Sec. 59, Ch. 535, L. 1975.

### Amendments

The 1971 amendment changed the age specified in the first sentence from 21 for males and 18 for females to 19 for either.

The 1973 amendment reduced the age specified in the first sentence from nineteen to eighteen years.



The 1975 amendment substituted "if neither parent \* \* \* be living" in the second sentence for "if the father \* \* \* be not

living"; and made minor changes in phraseology and punctuation.

## CHAPTER 101—BIRTH DATE—PROCEDURE FOR JUDICIAL DETERMINATION

### 93-101-4. Fees—certification of judgment.

#### Compiler's Notes

Section 105, Ch. 349, Laws 1974, substituted "department of health and en-

vironmental sciences" in this section for "bureau of vital statistics, state board of health."

## CHAPTER 301—EVIDENCE—DEFINITIONS—KINDS AND DEGREES OF

### 93-301-4. (10491) The degree of proof required to establish facts.

#### Criminal Cases

Evidence that included victim's testimony corroborated by medical evidence was sufficient to support jury conviction of statutory rape. *State v. Anderson*, 156 M 122, 476 P 2d 780.

#### Insufficient Evidence

Where lessee alleged breach of covenant of quiet enjoyment on grounds that he had been substantially deprived of his prorata share of parking spaces in shopping center lot, his evidence in support of allegations was insufficient under this section and section 93-301-13 since it consisted only of testimony that on one occasion parking lot was full but only three tables were occupied in lessee's restaur-

*rant. Joseph v. Hustad Corp.*, 153 M 121, 454 P 2d 916.

Where owner of mineral rights to property built road for access to his oil well on property owned by plaintiff and such road was alleged to have been causing plaintiff's dam and spillway to erode, jury verdict of damages for such injury was reversed, since dam and spillway had not in fact washed out and evidence did not indicate conclusively that washout was inevitable; therefore plaintiff's evidence did not preponderate in favor of findings on which it was based as provided by this section and section 93-301-13. *Hurley v. Northern Pacific R. Co.*, 153 M 199, 455 P 2d 321.

### 93-301-7. (10494) Primary evidence defined.

#### Untimely Motion for Best Evidence

Although based on valid grounds of best evidence rule, defendant's motion to strike the testimony of the state fire marshal regarding the results of gas chromatogram test, without entry of chromatogram itself or any standards of interpretation, was not timely when made during cross-examination of another witness later in the trial, and was properly overruled. *State v. Burtchett*, — M —, 530 P 2d 471, certiorari denied, 420 US 974, — L Ed 2d —, 95 S Ct 1397.

tation, was not timely when made during cross-examination of another witness later in the trial, and was properly overruled. *State v. Burtchett*, — M —, 530 P 2d 471, certiorari denied, 420 US 974, — L Ed 2d —, 95 S Ct 1397.

### 93-301-11. (10498) Prima-facie evidence defined.

#### Ownership of Cattle

Although under sections 46-606 and 67-308 prima facie the owners of the recorded brand have the same interest in the cattle bearing their brand as shown in brand record, joint ownership of the cattle may be contradicted and overcome by other evidence under this section. *Marshall v. Minlschmidt*, 148 M 263, 419 P 2d 486, 490.

In action by administrator of estate of deceased partner against surviving partners to recover assets transferred by deceased during his last illness, evidence that deceased had a half interest in partnership cattle and failure of defendants

to produce any of the partnership records at the trial in the lower court, sustained finding that heir of deceased had overcome the prima facie showing of one-third interest in the partnership cattle arising from the recording of the brand in name of three persons. *Marshall v. Minlschmidt*, 148 M 263, 419 P 2d 486, 491.

#### Statutory Rape

Prima facie case of statutory rape was established by testimony of rape victim on cross- and redirect examination that defendant had committed an act of sexual intercourse with her. *State v. Anderson*, 156 M 122, 476 P 2d 780.

**93-301-13. (10500) Satisfactory evidence defined.****Insufficient Evidence**

Where lessee alleged breach of covenant of quiet enjoyment on grounds that he had been substantially deprived of his prorata share of parking spaces in shopping center lot, his evidence in support of allegations was insufficient under this section and section 93-301-4 since it consisted only of testimony that on one occasion parking lot was full but only three tables were occupied in lessee's restaurant. *Joseph v. Hustad Corp.*, 153 M 121, 454 P 2d 916.

Where owner of mineral rights to prop-

erty built road for access to his oil well on property owned by plaintiff and such road was alleged to have been causing plaintiff's dam and spillway to erode, jury verdict of damages for such injury was reversed since dam and spillway had not in fact washed out and evidence did not indicate conclusively that washout was inevitable; therefore plaintiff's evidence did not preponderate in favor of findings on which it was based as provided by this section and section 93-301-4. *Hurley v. Northern Pacific R. Co.*, 153 M 199, 455 P 2d 321.

**CHAPTER 401—EVIDENCE—GENERAL PRINCIPLES OF****93-401-4. (10508) Witness presumed to speak the truth.****Accomplice as Witness**

In a first degree burglary case the credibility of the defendant's accomplice, a convicted felon, was for the jury. *State v. Barick*, 143 M 273, 389 P 2d 170.

**Credibility of Witnesses**

Testimony that a truck had earlier been

observed traveling at 65 to 70 miles per hour was admissible to impeach the credibility of driver's employer, who had testified that the truck could not attain speeds higher than 35 to 38 miles per hour. *Seder v. Peter Kiewit Sons' Co.*, 156 M 322, 479 P 2d 448.

**93-401-7. (10511) Declarations which are a part of the transaction.****Res Gestae**

Statements made by decedent to her neighbors to the effect that her husband had beaten her the previous evening and that morning and that she was anxious to leave the house were not part of the res gestae and not admissible in prosecution against husband for voluntary manslaughter where statements were made twelve to thirteen hours after the alleged beating and decedent died nearly 24 hours later in a hospital as a result of a subarachnoid clot caused by external

trauma. *State v. Newman*, — M —, 513 P 2d 258.

**Time between Transaction and Declaration**

In a negligence action by passenger of car struck by truck, testimony of truck driver concerning declarations of driver of automobile concerning speed at which he was traveling was admissible even though made some ten minutes after collision. *Blevins v. Weaver Constr. Co.*, 150 M 158, 432 P 2d 378.

**93-401-9. (10513) Declaration of decedent evidence of pedigree.****References**

Cited in *Bender v. Bender*, 144 M 470, 397 P 2d 957.

**93-401-11. (10515) When part of the transaction proved, etc.****References**

*State Highway Commission v. Churchwell*, 146 M 52, 403 P 2d 751.

**93-401-12. (10516) Contents of writing—how proved.****Duplicate Original**

Carbon copy made at same time as original and with all formalities of the first sheet was a "duplicate original" and thereby properly admitted as original retail installment contract without explana-

tion of failure to produce the ribbon copy. *Morris v. Langhausen*, 155 M 362, 472 P 2d 860.

**Laboratory Test Results**

In an action for damages for death of

dairy cows and losses occasioned by poisoning, allowing cattle owner to testify concerning laboratory test results was not prejudicial where the testimony was

brought out properly later without objection. *Hopkins v. Ravalli County Electric Cooperative, Inc.*, 144 M 161, 395 P 2d 106, 109, 12 ALR 3d 1096.

### 93-401-13. (10517) An agreement reduced to writing deemed the whole.

#### Clear Language

Parol testimony was not admissible to extend the term of a permissive easement beyond the expiration date set in a written agreement that clearly contained no mistake, imperfection or ambiguity. *Larson v. Burnett*, 158 M 421, 492 P 2d 921.

No ambiguity existed between clause conveying one-half of the minerals in 1,040 acres and the conveyance of 520 mineral acres, so that mineral deed could not be varied by parol evidence. *Superior Oil Co. v. Vanderhoof*, 297 F Supp 1086.

#### Completeness of Writing

Statements made by various agency personnel in regard to continued use of

defendant's office building were not admissible under parol evidence rule to alter or contradict terms of express written contract since such statements and assurances did not come within any recognized exception to rule and since defendant admitted that he knew written contract would be controlling. *United States v. Willard E. Fraser Co.*, 308 F Supp 557, affirmed 459 F 2d 483.

#### References

*State Highway Commission v. Churchill*, 146 M 52, 403 P 2d 751; *Thisted v. Country Club Tower Corp.*, 146 M 87, 405 P 2d 432.

### 93-401-15. (10519) Construction of statutes and instruments, etc.

#### Insurance Policy

Clause in disability insurance policy which provided that benefits were payable only in cases involving continuous and total disability within 30 days of date of accident preventing performance of every duty pertaining to insured's occupation, precluded recovery under policy by insured who returned to work temporarily within 30-day period and was able to do a portion of his duties since,

where language admits of only one meaning, there is no room for interpretation under the guise of ambiguity. *Nelson v. Combined Ins. Co. of America*, 155 M 105, 467 P 2d 707.

#### References

*In re Jones' Estate*, 146 M 439, 408 P 2d 482; *Wolff v. Standard Life & Accident Ins. Co.*, 147 M 460, 416 P 2d 11, 17.

### 93-401-17. (10521) The circumstances to be considered.

#### Building Lease

Statements made by various agency personnel in regard to continued use of defendant's office building were not admissible under parol evidence rule to alter or contradict terms of express written contract since such statements and assurances did not come within any recognized exception to rule and since defendant admitted that he knew written contract would be controlling. *United States v. Willard E. Fraser Co.*, 308 F Supp 557, affirmed 459 F 2d 483.

#### Intention of Parties

Informal written instrument stating "I wish to pay" and uncontradicted evidence that donor rejected lawyers and wanted

to give a gift established donative intent. *Faith Lutheran Retirement Home v. Veis*, 156 M 38, 473 P 2d 503.

#### Mineral Deed

No ambiguity existed between clause conveying one-half of the minerals in 1,040 acres and the conveyance of 520 mineral acres, so that mineral deed could not be varied by parol evidence. *Superior Oil Co. v. Vanderhoof*, 297 F Supp 1086.

#### References

*Close v. Ruegsegger's Estate*, 143 M 32, 386 P 2d 739; *Thisted v. County Club Tower Corp.*, 146 M 87, 405 P 2d 432; *Ryan v. Ald, Inc.*, 146 M 299, 406 P 2d 373.

### 93-401-26. (10530) Affirmative only can be proved.

#### Notice

Where plaintiff alleged giving of notice which defendant denied, notice or lack thereof was put in issue and plaintiff had

burden of proof. *Glacier General Assurance Co. v. State Farm Mutual Automobile Ins. Co.*, 150 M 452, 436 P 2d 533.



**Partial Payment**

Partial payment by special deposit was an affirmative defense which debtor had burden of proving in suit on note; that burden of proof required that it be shown that payment was made on the particular

obligation in controversy. *Baker Nat. Bank v. Lestar*, 153 M 45, 453 P 2d 774.

**References**

*Colarchik v. Watkins*, 144 M 17, 393 P 2d 786.

**93-401-27. (10531) Facts which may be proved on trial.****Admission by Living Person**

In an action by property owner against church camp for damage from fire begun by camp counselor, letter written by counselor admitting starting fire accidentally was inadmissible as declaration against interest since counselor, although unavailable to testify, was not dead within requirement of subdivision 4. *MacDonald v. Protestant Episcopal Church*, 150 M 332, 435 P 2d 369.

**Admissions against Interest—Pleadings**

Pre-trial order which limited issues to be litigated did not supersede plaintiff's original complaint to sustain trial court's ruling that defendant could not use complaint to cross-examine plaintiff concerning certain inconsistencies between plaintiff's original complaint and his testimony; although this refusal by trial court was error, it was not ground for reversal since error was "harmless." *Fox v. Fifth West, Inc.*, 153 M 95, 454 P 2d 612.

**Boundary Lines**

In boundary dispute, where the monuments to the boundary of a thoroughfare were obliterated, the boundaries were properly proven by tradition, customary usage and the way in which buildings along the thoroughfare had been built. *Brady v. State Highway Commission*, — M —, 517 P 2d 738.

**Expert Testimony**

Ex-highway patrolman, who had twenty years' experience investigating automobile accidents, including determinations of speed from skidmarks and surrounding circumstances, and was skilled in use of graphs and charts used by National Safety Council and Montana Highway Patrol in connection with determining speed from skidmarks, was qualified to give expert opinion evidence as to speed of defendant's automobile, even though he had retired from highway patrol some six years previously, had first heard of accident two weeks before trial, did not measure drag factor or coefficient of friction on particular road surface involved and, as mere highway patrolman, would not have been

permitted to testify to investigation made year and one-half after accident. *Graham v. Rolandson*, 150 M 270, 435 P 2d 263.

**Hypothetical Question**

Hypothetical question directed to fire-arms expert, as to the amount of smoke and powder residue he would expect to find on the victim's sleeve, which did not assume any facts not in evidence, was properly admissible, since the purpose of the hypothetical question directed to an expert witness is to enable the jury to understand the facts and their consequences. *State v. Thompson*, — M —, 524 P 2d 1115.

**Qualification by Practical Experience**

Trial court did not err by permitting fire marshal to testify as expert witness on possible or probable cause of fire where fire marshal had served seventeen years as a fireman, had attended six seminars on fire and arson investigation, had completed another 100-hour fire and arson investigation course, had assisted in planning a state arson school, all of which studies encompassed the subjects of fire investigation, arson, explosions, evidence, interviewing witnesses, photography, collection and preservation of evidence and determination of origin of fires. *Haynes v. County of Missoula*, — M —, 517 P 2d 370.

**Res Gestae**

Statements made by decedent to her neighbors to the effect that her husband had beaten her the previous evening and that morning and that she was anxious to leave the house were not admissible under the "dying declarations" exception in prosecution against husband for voluntary manslaughter where decedent died nearly 24 hours later in a hospital as a result of a subarachnoid clot caused by external trauma. *State v. Newman*, — M —, 513 P 2d 258.

**References**

Cited in *Bender v. Bender*, 144 M 470, 397 P 2d 957; *McReynolds v. McReynolds*, 147 M 476, 414 P 2d 531.

## CHAPTER 501—EVIDENCE—JUDICIAL NOTICE OF FACTS AND FOREIGN LAWS

### 93-501-1. (10532) Certain facts of general notoriety assumed to be, etc.

#### Actual Knowledge

The burden of proof is on the individual litigant, and the courts are not required by the doctrine of judicial notice to inform themselves of facts not within the actual knowledge of the court, nor need the courts take judicial notice of a fact or facts when the party desiring such notice does not request it. *Holtz v. Babcock*, 143 M 341, 389 P 2d 869, 390 P 2d 801.

#### Judicial Acts and Records

Probate judge, in determining distribution of estate, has power to determine circumstances of decedent's death and in

doing so properly took notice under subdivision 2 of this section of wife's conviction of manslaughter in death of her husband. *Sikora v. Sikora*, 160 M 27, 499 P 2d 808.

#### Succession to Office

The court took notice that upon his death the governor was succeeded as provided by law. *Holtz v. Babcock*, 143 M 341, 389 P 2d 869, 390 P 2d 801.

#### References

*Rambur v. Diehl Lumber Co.*, 144 M 84, 394 P 2d 745, 749; *State v. Peters*, 146 M 188, 405 P 2d 642.

## CHAPTER 601—EVIDENCE—REPORTERS' CONFIDENCE ACT

Section 93-601-2. Disclosure of information and source of information—when not required.

**93-601-2. Disclosure of information and source of information—when not required.** (1) Without his consent no person engaged, or who was so engaged at the time the information sought was procured, in the work of or connected with or employed by any newspaper, news service, radio station, television station, or community antenna television service for the purpose of gathering, writing, editing, or disseminating news may be examined as to, or may be required to disclose, any information obtained or prepared or the source of that information in any legal proceeding if the information was gathered, received, or processed in the course of his employment.

(2) A person engaged as in subsection (1) may not be adjudged in contempt by a judicial, legislative, administrative, or any other body having the power to issue subpoenas for refusing to disclose the source of any information or for refusing to disclose any information obtained or prepared in gathering, receiving, or processing information in the course of his employment.

(3) Dissemination, except as provided in subsection (4), in whole or in part does not constitute a waiver of provisions of subsection (1) or (2), or both.

(4) If the person claiming the privilege voluntarily offers to testify, with or without having been subpoenaed, before a judicial, legislative, administrative, or other body having the power to issue subpoenas, he waives the provisions of subsections (1) and (2).

**History:** En. Sec. 2, Ch. 195, L. 1943; amd. Sec. 1, Ch. 56, L. 1951; amd. Sec. 1, Ch. 225, L. 1977.

#### Amendments

The 1977 amendment rewrote this section. For prior version, see parent volume.

## CHAPTER 701—EVIDENCE—WITNESSES

Section 93-701-4. Persons in certain relations cannot be examined.

**93-701-1. (10533) Witness defined.**

**References**

State v. Barick, 143 M 273, 389 P 2d 170.

**93-701-2. (10534) All persons capable of perceptions, etc.**

**Felony Conviction**

An accomplice may testify in a criminal case even though he is a convicted felon

at the time of his testimony. State v Barick, 143 M 273, 389 P 2d 170.

**93-701-3. (10535) Persons who cannot be witnesses.**

**Deceased Agent—Injustice Prevented**

Before a witness who is barred by subdivision 4 will be allowed to testify to prevent an injustice, a foundation must be laid by the introduction of other evidence which shows that in all probability the proponent had a meritorious cause of action. Johnson v. Mommoth Lode & Uranium Exploration Corp., 136 M 420, 348 P 2d 267.

**Decedents' Estates—Injustice Prevented**

District court did not abuse its discretion in allowing a witness otherwise barred under subdivision 3 to testify as to agreement with partner for mutual wills as against intestate heirs of deceased partner, upon showing that the witness and the deceased held saving accounts, corporate stock, and residence in joint tenancy with right of survivorship, that the witness and the deceased had had a lifelong association and successful partnership under both oral agreement and written articles of copartner-

ship, that the witness had willed his entire estate to the deceased, and the witness and the deceased had intended for the proceeds of the sale of the partnership to be in joint tenancy with right of survivorship and that this was evidenced by an escrow receipt instructing payment of proceeds to a jointly held bank account. Hansen v. Kiernan, 159 M 448, 499 P 2d 787.

**Decedent's Estates—Written Communications**

Trial court's finding based upon oral testimony concerning terms of contract executed by deceased was error since such oral testimony, varying terms of written contract, was inadmissible under this section. Davison v. Casebolt, 154 M 125, 461 P 2d 2.

**References**

State v. Barick, 143 M 273, 389 P 2d 170.

**93-701-4. (10536) Persons in certain relations cannot be examined.** There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases:

1. A husband cannot be examined for or against his wife without her consent; nor a wife for or against her husband without his consent; nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other nor to a criminal action or proceeding for a crime committed by one against the other.

2. An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him or his advice given thereon in the course of professional employment.

3 to 6. \* \* \* [Same as parent volume.]



7. A counselor, psychologist, nurse, or teacher, employed by any educational institution, cannot be examined as to communications made to him in confidence by a duly registered student of such institution; provided, however, that this provision shall not apply where consent has been given by the student, if not a minor, or if he is a minor, by the student and his parent or legal guardian.

8. A speech pathologist or audiologist cannot, without the consent of his client, be examined in a civil action as to any communication made by the client to him.

**History:** Ap. p. Secs. 373-377, pp. 210, 211, L. 1867; re-en. Secs. 447-451, p. 125, Cod. Stat. 1871; en. Secs. 629, 630, pp. 203, 204, L. 1877; re-en. Secs. 629, 630, 1st Div. Rev. Stat. 1879; re-en. Secs. 650, 651, 1st Div. Comp. Stat. 1887; re-en. Sec. 3163, C. Civ. Proc. 1895; re-en. Sec. 7892, Rev. C. 1907; re-en. Sec. 10536, R. C. M. 1921; amd. Sec. 1, Ch. 83, L. 1925; amd. Sec. 1, Ch. 130, L. 1931; amd. Sec. 1, Ch. 61, L. 1971; amd. Sec. 1, Ch. 318, L. 1973; amd. Sec. 15, Ch. 543, L. 1975; amd. Sec. 2, Ch. 225, L. 1977.

#### Amendments

The 1971 amendment added subdivision 7.

The 1973 amendment added subdivision 8.

The 1975 amendment added subdivision 9.

The 1977 amendment deleted a former subdivision 8 relating to any communication made to a publisher, editor, or other person connected to a newspaper, press association or wire service or to a radio or television news reporter or persons connected with a radio or television station and providing that they should not be held in contempt of court for failure to disclose source of information; redesignated former subdivision 9 as subdivision 8; and made minor changes in punctuation.

#### Attorney and Client

Opinions of house counsel rendered to an employer were entitled to the attorney-client privilege, and where portions of them had been disclosed in camera, the

client was entitled to a protective order preventing their further disclosure or use in pleadings by the opponent. *State ex rel. Union Oil Co. of California v. District Court*, 160 M 229, 503 P 2d 1008.

#### Child Custody Proceedings

Confidentiality of privileged communications does not prevent disclosure of information obtained by school nurse, public nurse, and social welfare workers as evidence at custody hearing for dependent and neglected children. *Matter of Declaring Jones and Peterson Children*, — M —, 539 P 2d 1193.

#### Husband and Wife

Section 95-3011, rather than subdivision (1) of this section, was applicable in determining existence of marital privilege in homicide prosecution. *State v. Taylor*, — M —, 515 P 2d 695.

#### Physician and Patient

The physician-patient privilege under subsection 4 of this section is not available to a defendant in a criminal action since the provision in section 94-7209 (now 95-3001) incorporating the civil rules of evidence into the criminal law "except as otherwise provided" pertains to the language of subsection 4 which specifically limits the privilege to civil actions. *State v. Campbell*, 146 M 251, 405 P 2d 978, 22 ALR 3d 824.

#### References

*State v. Barick*, 143 M 273, 389 P 2d 170.

### CHAPTER 801—EVIDENCE—UNIFORM BUSINESS RECORDS AS EVIDENCE ACT—UNIFORM PHOTOGRAPHIC COPIES OF BUSINESS AND PUBLIC RECORDS AS EVIDENCE ACT

Section 93-801-5. Reproductions of originals.

#### 93-801-1. "Business" defined.

NOTE.—Uniform State Law. In addition to the states listed in the note in the parent volume the following also have

adopted the Uniform Business Records as Evidence Act: Connecticut, Michigan, and Rhode Island.

**93-901-2. Proof of business records.****Accuracy of Records**

In first degree murder trial, transcript of tape-recorded statement by defendant was not admissible as business record where no one testified as to the accuracy of the transcription and tapes were either lost or destroyed sometime between the time of the taking of the statement and the time of the trial. *State v. Warwick*, 158 M 531, 494 P 2d 627.

**Foundation for Admissibility**

An altered and edited copy of an inspection report, prepared for the possibility of litigation, does not qualify for admission as a business record. *Pessl v. Bridger Bowl*, — M —, 524 P 2d 1101.

**Medical Records**

Medical testimony based on information acquired from outside sources, including examinations by other doctors,

nurse's notes and observation, X-rays, and other tools of the profession used in making a diagnosis is admissible if part of the case file. *Klaus v. Hillberry*, 157 M 277, 485 P 2d 54.

**Suicide Note**

Suicide note written by stockbroker of decedent which stated that the stockbroker had, over a course of years, misappropriated large amounts of stock certificates entrusted to him, was admissible to show that securities had been stolen prior to decedent's death and that such securities were not an "asset" for which the executor could be held responsible in an action instituted by beneficiary of decedent's estate alleging that executor had negligently failed to collect assets of decedent. *In re Estate of Schueren*, — M —, 512 P 2d 1283.

**93-801-5. Reproductions of originals.** If any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence or event, and in the regular course of business has caused any or all of the same to be recorded, copied or reproduced by any photographic, photostatic, microfilm, microcard, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless its preservation is required by law. Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding, whether the original is in existence or not, and an enlargement or facsimile of such reproduction is likewise admissible in evidence, if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement or facsimile, does not preclude admission of the original.

**History:** En. Sec. 1, Ch. 100, L. 1953; amd. Sec. 1, Ch. 160, L. 1969.

**Amendments**

The 1969 amendment deleted a limitation in the first sentence that original may be destroyed unless "held in a custodial or fiduciary capacity."

**NOTE.**—Uniform State Law. In addition to the states listed in the note in the parent volume the following also have adopted the Uniform Photographic Copies of Business and Public Records as Evidence Act: Arkansas, Delaware, Michigan, and West Virginia.

## CHAPTER 901—EVIDENCE—UNIFORM OFFICIAL REPORTS AS EVIDENCE ACT

**93-901-1. Official reports admissible as evidence.**

**NOTE.**—Uniform State Law. Sections 93-901-1 through 93-901-5 constitute the "Uniform Official Reports as Evidence Act" approved by the National Confer-

ence of Commissioners on Uniform State Laws in 1936 and adopted in various forms in Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Missouri, Nebraska, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Washington, Wisconsin, Wyoming, and also in the Virgin Islands.

#### **Accident Report Inadmissible**

Undated, unsworn accident investigation

report of the forest service was hearsay and inadmissible since the preparer of the report who actually investigated the condition of the ski lift was not a witness at trial. *Pessl v. Bridger Bowl*, — M —, 524 P 2d 1101.

#### **Criminal Investigation Lab Reports**

Written report of chemist at state criminal investigation lab was admissible as a statutory exception to the hearsay rule pursuant to this act. *State v. Snider*, — M —, 541 P 2d 1204.

### **93-901-3. Cross-examination.**

#### **Admissibility of Report**

Written report of chemist from the state criminal investigation lab was admissible without the presence of the chemist at trial for verification or cross-

examination, since defendant was free to subpoena the chemist as a witness if he wished to contest the report. *State v. Snider*, — M —, 541 P 2d 1204.

## **CHAPTER 1001—EVIDENCE—PUBLIC WRITINGS**

### **93-1001-9. (10547) Constitution and statutes.**

#### **References**

*State ex rel. Peery v. District Court*, 145 M 287, 400 P 2d 648.

### **93-1001-19. (10557) Copy of a foreign record—when evidence.**

#### **References**

*In re Hosova's Estate*, 143 M 75, 387 P 2d 305.

### **93-1001-23. (10561) What deemed adjudged in a judgment.**

#### **Collateral Estoppel**

Buyers of land under contract for deed were not estopped from bringing an action to establish beneficial ownership of water rights and water stock under the contract for deed by virtue of having brought a prior action for specific performance of the contract where the district court, in the first case, refused

to adjudicate the water rights as an issue which was beyond the scope of the controversy presented to it; failure to take an appeal from the trial court's denial to decide the controversy in the prior case did not effect a judicial determination of the controversy. *Schwend v. Jones*, — M —, 515 P 2d 89.

### **93-1001-30. (10568) Manner of proving other official documents.**

#### **References**

*Holtz v. Babcock*, 143 M 341, 390 P 2d 801.

## **CHAPTER 1101—EVIDENCE—PRIVATE WRITINGS**

### **93-1101-9. (10585) Original writing to be proved or accounted for.**

#### **Duplicate Original**

Carbon copy made at same time as original and with all formalities of the first sheet was a "duplicate original" and thereby properly admitted as original re-

tail installment contract without explanation of failure to produce the ribbon copy. *Morris v. Langhausen*, 155 M 362, 472 P 2d 860.



**93-1101-17. (10594) Entries of decedents evidence in specified cases.****Suicide Note**

Suicide note written by stockbroker of decedent which stated that the stockbroker had, over a course of years, misappropriated large amounts of stock certificates entrusted to him, was admissible to show that securities had been stolen prior to decedent's death and that

such securities were not an "asset" for which the executor could be held responsible in an action instituted by beneficiary of decedent's estate alleging that executor had negligently failed to collect assets of decedent. In re Estate of Schueren, — M —, 512 P 2d 1283.

## CHAPTER 1201—EVIDENCE—MATERIAL OBJECTS OTHER THAN WRITINGS

**93-1201-1. (10599) Material objects.****Tampering with Evidence**

Admission in evidence of plastic bag containing marijuana was within the discretion of the trial court, in a prosecution for sale of dangerous drugs, on the

testimony of a witness connecting the bag with defendant, and defendant had burden of proof that bag had been tampered with. State v. Thomas, — M —, 532 P 2d 405.

## CHAPTER 1301—EVIDENCE—INDIRECT—INFERENCES AND PRESUMPTIONS

**93-1301-1. (10600) Indirect evidence classified.****Presumption Regarding Sentencing**

Presumption that first offender under Dangerous Drug Act is entitled to de-

layed imposition of sentence is kind of indirect evidence under this section. State v. Simtob, 154 M 286, 462 P 2d 873.

**93-1301-2. (10601) Inference defined.****Inference Distinguished from Suspicion**

An inference is to be distinguished from mere suspicion which is "the act or an instance of suspecting: imagination or apprehension of something wrong or hurt-

ful without proof or on slight evidence" (quoting Webster's New International Dictionary, 3rd ed. 1961). State v. Barick, 143 M 273, 389 P 2d 170.

**93-1301-3. (10602) Presumption defined.****Presumption Regarding Sentencing**

Presumption regarding sentencing under Dangerous Drug Act "is a deduction which the law expressly directs to be made from particular facts." State v. Simtob, 154 M 286, 462 P 2d 873.

**References**

State v. Barick, 143 M 273, 389 P 2d 170.

**93-1301-4. (10603) When an inference arises.****References**

State v. Barick, 143 M 273, 389 P 2d 170.

**93-1301-5. (10604) Presumptions may be converted, when.****Adverse Possession**

Although this section provides that presumptions may be overcome by other evidence, presumption of adverse possession was not overcome by evidence showing

acquiescence since acquiescence did not amount to permissive use or license. O'Connor v. Brodie, 153 M 129, 454 P 2d 920.

**93-1301-6. (10605) Specification of conclusive presumptions.****Acts Constituting Estoppel**

Director of closely held corporation who was obligated to sell his shares back to the corporation pursuant to repurchase agreement was estopped to deny his acquiescence to the terms of the sale by virtue of his response to telephone calls indicating his willingness to sell the shares and requesting the proceeds to be paid to his creditors with the remaining balance to himself, by virtue of the corporate officer's testimony that the director knew of the board of directors' resolution to exercise their option to purchase his stock at fifty per cent of its book value, by virtue of the director's conduct which led the corporation to believe the consent to purchase would be signed and by virtue of the director's failure to object to the proceedings of the corporation in enacting the resolution calling for the repurchase of his stock, which actions resulted in the failure of the corporation to call a meeting of the board of directors within the period during which the corporation's right to repurchase the stock could have been properly exercised. *State ex rel. Howeth v. D. A. Davidson & Co.*, — M —, 517 P 2d 722.

**Deed from Mother to Son**

Conclusive presumption was not established in situation where court refused to impose constructive trust upon lands deeded to son by aged mother. *Bodine v. Bodine*, 149 M 29, 422 P 2d 650.

**Estoppel by Own Acts**

Lessors of mineral rights were not estopped from denying validity of lease by lessee's contention that lessors led him to believe that previous lease had expired by showing him a "notice" of breach sent to previous lessee where lessee actually relied upon county records and was aware of the prior lease of record covering the same land. *Christian v. A. A. Oil Corp.*, 161 M 420, 506 P 2d 1369.

The doctrine of equitable estoppel set forth in subdivision 3 of this section is not available as a defense when the essential elements of estoppel are lacking. *Belhumeur v. Dawson*, 229 F Supp 78, 86.

**Legitimacy**

Child is presumed legitimate if mother and father were married. *Spradlin v. United States*, 262 F Supp 502.

**93-1301-7. (10606) All other presumptions may be controverted.****Controversion of Presumption**

Presumption that first offender under Dangerous Drug Act is entitled to delayed imposition of sentence is disputable and may be controverted by other evidence but controls unless so contradicted. *State v. Simtob*, 154 M 286, 462 P 2d 873.

**Subdivision 4**

Deceased was presumed to have taken ordinary care of his own concerns, however plaintiff's evidence in wrongful death action showing deceased's failure to properly test empty gasoline tank before welding it which could very well have been cause of accident contradicted presumption. *Knowlton v. Sandaker*, 150 M 438, 436 P 2d 98.

Damages were properly denied where the uncontroverted evidence showed that the plaintiff, while working near overhead power lines, had failed to exercise ordinary care for his own safety, which failure proximately caused his injuries. *Sprankle v. DeCock*, — M —, 530 P 2d 457.

**Subdivision 15**

Statutory presumption that "official duty has been regularly performed" was not overcome where defendant offered no evidence to show that any prospective juror

was improperly excused from service and where judge testified that no prospective juror was excused from service without valid statutory excuse. *State v. Corliss*, 150 M 40, 430 P 2d 632.

On basis of statutory presumption and on basis of testimony of county employee that he had been ordered to maintain road by county commissioner who was also owner of the land, court concluded that then owner of land regarded road as public highway, in determining that public highway had been established by prescriptive use. *Kostbade v. Metier*, 150 M 139, 432 P 2d 382.

Findings and conclusions of district court are presumed correct and will not be reversed on appeal unless evidence, even though conflicting, preponderates against them. *Breen v. Industrial Accident Board*, 150 M 463, 436 P 2d 701.

Statutory presumption in subdivision 15 imposed a heavy burden upon party attacking bank superintendent's order permitting establishment of another bank in a community, and where superintendent made a thorough investigation, secured opposing views, and considered all evidence, including some confidential evidence as to economic prospects within the community, the evidence that he acted within his discretionary powers was

so great as to support a summary judgment denying injunction or prohibition against the superintendent's action. *Miners & Merchants Bank v. Dowdall*, 158 M 142, 489 P 2d 1274.

Statutory presumption of correctness of secretary of state's certification as to total number of electors voting at election on new constitution was overcome by demonstrable fact, apparent from other figures in his certificate, that not that many electors cast valid votes on either side of the question. *State ex rel. Cashmore v. Anderson*, 160 M 175, 500 P 2d 921, certiorari denied in 410 US 931.

Where petitioner claimed, fourteen years after his conviction, that his confession had been coerced and records of the proceedings against him were incomplete, but he had counsel to represent him on a second charge brought against him a few days later, presumption that petitioner had voluntarily waived right to counsel on the first charge, besides the fact that he had pleaded guilty to it so that confession was not used against him, reinforced presumption that the proceedings had not violated his constitutional rights. *Frost v. State of Montana*, 249 F Supp 349.

#### Subdivision 17

Absent proof that evidence at hearing on entry of default judgment was insufficient or that an erroneous standard of damages was used, presumption that judgment was correct controlled on appeal, and aggrieved party could not attack evidence on which default judgment was based by introducing evidence in support of his proposed defense at hearing on his motion to vacate default judgment. *Uffelman v. Labbit*, 152 M 238, 448 P 2d 690.

Where petitioner claimed, fourteen years after his conviction, that his confession had been coerced and records of the proceedings against him were incomplete, fact that defendant had pleaded guilty to the crime charged so that confession was not used, and record stated he had waived right to counsel reinforced presumption under this subdivision that defendant's constitutional rights to counsel and against self-incrimination had not been violated. *Frost v. State of Montana*, 249 F Supp 349.

#### Subdivision 18

Presumption was not overcome where jury found in favor of defendant on his counterclaim filed in response to plaintiff's action for negligence from which may be inferred fact that issue of defendant's negligence was before the jury and that in not finding for plaintiff jury concluded that defendant was not negligent.

*Ratcliff v. Murphy*, 150 M 31, 430 P 2d 627.

#### Subdivision 24

Presumption under this section that condemnnee had received revised contract from state was strengthened by facts that condemnnee received other documents enclosed in the same envelope, the envelope was not returned to the state office and the condemnnee was well-known in the vicinity. *Crissey v. State Highway Commission*, 147 M 374, 413 P 2d 308.

Testimony that notice was signed, placed in properly addressed envelope with sufficient postage thereon and mailed by certified mail was sufficient foundation for district court to admit original document into evidence and make finding that required notice was given. *Treasure State Industries, Inc. v. Leigland*, 151 M 288, 443 P 2d 22.

Fact that letter addressed to county department of public welfare was mailed does not establish when it was received or that it was received by a responsible official. *Application of Hendrickson*, 159 M 217, 496 P 2d 1115.

#### Subdivision 30

Evidence that man and woman exchanged wedding rings, mutually declared their marriage, and thereafter openly lived together, supported finding that they were married. *Estate of Swanson*, 160 M 271, 502 P 2d 33, distinguished in 509 P 2d 293, 295.

In view of statute recognizing common-law marriage, presumption that man and woman deporting themselves as husband and wife have entered into lawful contract of marriage is itself proof of marriage and is overcome as matter of law only when in light of proved facts reasonable men could no longer find in accordance with presumed fact. *Spradlin v. United States*, 262 F Supp 502.

Presumption of valid common-law marriage may be overcome if divorce records from the residences of alleged common-law husband reveal that he was not divorced from former wife or had not had former marriage annulled. *Spradlin v. United States*, 284 F Supp 763.

#### Subdivision 33

Findings and conclusions of district court are presumed correct and will not be reversed on appeal unless the evidence, even though conflicting, preponderates against them. *Breen v. Industrial Accident Board*, 150 M 463, 436 P 2d 701.

#### References

Subdivision 15: *Tooker v. State*, 147 M 207, 410 P 2d 923; *Wilson v. Brodie*, 148 M 235, 419 P 2d 306, 308.



Subdivision 16: *Wilson v. Brodie*, 148 M 235, 419 P 2d 306, 308.

Subdivision 17: *Tooker v. State*, 147 M 207, 410 P 2d 923; *Wilson v. Brodie*, 148 M 235, 419 P 2d 306, 308.

## CHAPTER 1401—EVIDENCE—INDISPENSABLE—UNWRITTEN AGREEMENTS—CONCLUSIVE—UNANSWERABLE

Section 93-1401-3. Will to be in writing.

**93-1401-3. (10609) Will to be in writing.** A last will and testament is invalid unless it be in writing and executed with such formalities as are required by law. When, therefore, such a will is to be shown, the instrument itself must be produced, or secondary evidence of its contents be given.

**History:** En. Sec. 3272, C. Civ. Proc. 1895; re-en. Sec. 7965, Rev. C. 1907; re-en. Sec. 10609, R. C. M. 1921; amd. Sec. 14, Ch. 263, L. 1975. Cal. C. Civ. Proc. Sec. 1969.

### Amendments

The 1975 amendment deleted "except a nuncupative will" after "testament"; and made minor changes in punctuation.

### Repealing Clause

Section 15 of Ch. 263, Laws 1975 read

"Sections 33-129, 84-4110, 91-103, 91-104, 91-109, 91-117 through 91-121, 91-123, 91-131, 91-132, 91-134, 91-202, 91-225, 91-302, 91-305, 91-306, 91-310, 91-315, 91-316, 91-320, 91-401, 91-422, 91-623 through 91-627, 91-812, 91-1201, 91-1202, 91-1205 through 91-1207, 91-1304, 91-2205, 91-2714, 91-2722, 91-3206, 91-3208, 91-3401, 91-3501 through 91-3519, 91-3609 through 91-3611, 91-4519, 91-4520, 91-4526, 91-4605, 91-4609, 91-4905, 91-5008 through 91-5016, 91-5201, 91-5204, 91-5205, 91-5211, 93-1401-4, and 93-6352 through 93-6354 are repealed."

**93-1401-4. (10610) Repealed.**

### Repeal

Section 93-1401-4 (Sec. 3273, C. Civ. Proc. 1895), relating to revocation of a

will, was repealed by Sec. 15, Ch. 263, Laws 1975.

**93-1401-7. (10613) Agreement not in writing—when invalid.**

### Estoppel from Raising Statute

Promisor was estopped from raising statute of frauds as defense to action on oral agreement on basis of evidence of glaring inconsistencies in promisor's position. *Daley v. Daley*, 150 M 432, 436 P 2d 88.

### Note or Memorandum

While the statute of frauds does not require that the memorandum be contained in a single document, where a memorandum did not name the parties to the alleged contract but referred to them as "we" and "our" and also tended to show that further negotiations were intended by the parties, it was not sufficient to satisfy the statute. *Anderson v. KFBB Broadcasting Corp.*, 143 M 423, 391 P 2d 2, distinguished in *Daley v. Daley*, 150 M 432, 436 P 2d 88.

### Option Agreement

Evidence of payment of money pursuant to the purchase of real estate for the purpose of persuading seller to hold the deal open for a certain period of time, and the

subsequent actions of the seller in holding the property off the market, were sufficient to establish a valid option agreement, as well as to show that the agreement had been fully performed. *Lynch v. Shields*, — M —, 529 P 2d 348.

### Part Performance

Where employer had been awarded construction contract to be completed in 360 days and hired employee under oral agreement almost immediately thereafter, fact that contract was later amended resulting in an extension of time to correct construction error did not make it invalid under this section, and therefore did not affect employee's right to recover salary upon being fired, since extension of time was not contemplated in the original contract; fact that employee had worked seven weeks also removed contract from bar of statute under doctrine of part performance. *Fox v. Fifth West, Inc.*, 153 M 95, 454 P 2d 612.

Buyer's tender of payment and a conveyance to be executed by seller did not constitute such performance or memo-

random as to take an oral agreement to sell land out of the operation of this section, where seller did not accept the

tender or execute the conveyance. *Myers v. Bendewald*, 160 M 338, 502 P 2d 412.

## CHAPTER 1501—EVIDENCE—PRODUCTION OF—SUBPOENAS

### 93-1501-1. (10616) Evidence to be produced, by whom.

#### Burden of Proof

Plaintiff had burden of proof that disputed range rights were based on land other than that purchased jointly by plaintiff and defendant and failure so to prove defeated plaintiff's claim that defendants were not entitled to one-half the appraised value of the range rights. *Watson v. Barnard*, 155 M 75, 469 P 2d 539.

#### Negligence

Where plaintiff's property was damaged by the dropping of fire retardant from airplanes and at the trial he failed to come forth with sufficient evidence to show the lack of due care under the circumstances, the trial court properly nonsuited plaintiff upon defendant's motion. *Stocking v. Johnson Flying Service*, 143 M 61, 387 P 2d 312.

Where plaintiff alleged giving of notice which defendant denied, notice or lack thereof was put in issue and plaintiff had burden of proof. *Glacier General Assur-*

*ance Co. v. State Farm Mutual Automobile Ins. Co.*, 150 M 452, 436 P 2d 533.

#### Partial Payment

Partial payment by special deposit was an affirmative defense which debtor had burden of proving in suit on note; that burden of proof required that it be shown that payment was made on the particular obligation in controversy. *Baker Nat. Bank v. Lestar*, 153 M 45, 453 P 2d 774.

#### Res Ipsa Loquitur

*Res ipsa loquitur* does not relieve the plaintiff of the burden of proving actionable negligence, nor is it sufficient that he show that he was injured and that the instrumentality which caused his injury was in the control of the defendant; he must also show that the accident would not have occurred in the ordinary course of events if the defendant had exercised due care. *Stocking v. Johnson Flying Service*, 143 M 61, 387 P 2d 312.

## CHAPTER 1901—EVIDENCE—GENERAL RULES OF EXAMINATION

### 93-1901-2. (10660) Witness not under examination may be excluded.

#### Ignorance of Order

Fact that witness did not hear court's order to absent himself from courtroom and, although present during part of another witness's testimony, was allowed to testify, was not reversible error in absence of showing that defendant was prejudiced. *State v. Love*, 151 M 190, 440 P 2d 275.

#### Officers as Witnesses

Failure to exclude prosecutor's police

witnesses, traditionally exempt from witness exclusionary rule, was not reversible error absent any showing of prejudice to the defendant, but in future, all witnesses should be excluded from courtroom where judge grants motion to sequester. *State v. Radi*, — M —, 542 P 2d 1206, overruling, as to future cases, *State v. Walsh*, 72 M 110, 232 P 194, and *State v. Fitzpatrick*, 149 M 400, 427 P 2d 300.

### 93-1901-6. (10664) When witness may refresh memory from notes.

#### Pretrial Statement

Trial court did not abuse its discretion in permitting state's witness to testify after he had refreshed memory by referring to a statement he had made after shooting incident, in absence of prejudice to defendant and in light of fact that witness acknowledged that he made statement after incident, that he recognized statement and that signature on statement was his. *State v. Gallagher*, 151 M 501, 445 P 2d 45.

#### Recitals in Instrument

Allowing investigating officer who was testifying at trial to read directly from copy of police report he had prepared was not error where officer relied upon report in order to testify with greater accuracy regarding defendant's admission of guilt. *State v. LaFreniere*, — M —, 515 P 2d 76.

#### References

*State v. Jones*, 143 M 155, 387 P 2d 913.

**93-1901-7. (10665) Cross-examination, as to what.****Prior Inconsistent Pleading**

Complaint filed in previous action by father alleging boy's leg was 75% permanently disabled, signed under oath by

father, was properly admitted on cross-examination of father who had previously testified otherwise. *Tigh v. College Park Realty Co.*, 149 M 358, 427 P 2d 57.

**93-1901-11. (10668) How impeached.****Collateral Matters**

Since a witness cannot be impeached by contradictory evidence on collateral matters, it was reversible error to allow plaintiff for purposes of impeachment to cross-examine defendant regarding a collateral matter, evidence of which had been ruled inadmissible before trial. *Holland v. Biggs*, — M —, 532 P 2d 411.

**Contradictory Evidence**

Employer's testimony that a truck could not be driven more than 35 to 38 miles per hour could be impeached by testimony that witness had, on a prior occasion, seen the truck traveling at 65 to 70 miles per hour. *Seder v. Peter Kiewit Sons' Co.*, 156 M 322, 479 P 2d 448.

After defendant testified that over the past six years he had "only" been picked up five or six times for driving while his license was suspended, prosecution could properly show the remainder of his rec-

ord, which included fifteen apprehensions for driving without a license, twelve speeding charges, six violations of basic rule, one display of a fictitious driving license, one improper lane usage, and two excessive muffler noise charges. *State v. Deshner* 158 M 188, 489 P 2d 1290.

**Criminal Defendant Impeached**

Enactment of subsection 95-1506(b) providing that notice and charges of prior convictions for purpose of enhancing sentence shall not be made known to the jury before return of verdict did not change any law relative to use of defendant's record to impeach his testimony should he decide to testify in his own behalf. *State v. Romero*, — M —, 505 P 2d 1207.

**References**

*State v. Lagge*, 143 M 289, 388 P 2d 792; *State v. Tully*, 148 M 166, 418 P 2d 549, 550.

**93-1901-12. (10669) Impeachment by evidence of declarations.****Prior Inconsistent Pleading**

Complaint filed in previous action by father alleging that boy's leg was 75% permanently disabled, signed by father under oath, was properly admitted for purpose of impeaching father who had previously testified otherwise. *Tigh v. College Park Realty Co.*, 149 M 358, 427 P 2d 57.

**Voluntary Nature of Statement**

It is unnecessary to establish the voluntariness of a prior inconsistent statement in order to introduce it for purposes of impeachment. *State v. Smith*, — M —, 541 P 2d 351.

**References**

*State v. Lagge*, 143 M 289, 388 P 2d 792.

**93-1901-13. (10670) Evidence of good character—when allowed.****Constructive Fraud**

In action for damages by purchasers of land against sellers and their real estate agent, based on a theory of constructive fraud, the character of the defendants was

not in issue and trial court's limitation of number of character witnesses was not prejudicial to defendant. *Goggans v. Winkley*, 159 M 85, 495 P 2d 594.

**93-1901-14. (10671) Writing shown to witness may be inspected, etc.****Pretrial Statement of Defendant**

The trial court did not err in permitting state's witness to read entire statement of defendant wherein defendant was warned of constitutional rights since it was mate-

rial evidence that defendant's constitutional rights and waiver thereof were clearly and understandably enunciated to defendant. *State v. Lucero*, 151 M 531, 445 P 2d 731.



## CHAPTER 2001—EVIDENCE—EFFECT OF

## 93-2001-1. (10672) Jury judges of effect of evidence, etc.

## Subdivision 3

Conviction would not be reversed for giving of instruction based on statute but including words "except in so far as it may be corroborated by other and credible evidence in the case," in absence of specific showing of prejudice. *State v. Rollins*, 149 M 481, 428 P 2d 462.

## Subdivision 4—Accomplice's Testimony

Where the court gave a defendant's instruction quoting this section verbatim in a criminal case, it may be assumed that the instruction was considered by the jury in weighing the evidence. *State v. Barick*, 143 M 273, 389 P 2d 170.

## Subdivisions 6 and 7

In action by administrator of estate

of deceased partner against surviving partners to recover assets transferred by the deceased during his last illness, evidence that deceased had a half interest in the partnership cattle and failure of defendants to produce any of the partnership records at the trial in the lower court, sustained finding that heir of deceased had overcome the prima facie showing of one-third interest in the partnership cattle arising from the recording of the brand in name of three persons. *Marshall v. Minlschmidt*, 148 M 263, 419 P 2d 486, 491.

## References

*State v. Lagge*, 143 M 289, 388 P 2d 792; *State v. Romero*, 146 M 77, 404 P 2d 500.

## CHAPTER 2201—EVIDENCE—RULES IN PARTICULAR CASES

- Section 93-2201-7. Settlement of claims—legislative policy.  
 93-2201-8. "Person" defined.  
 93-2201-9. Voluntary partial payment of claim not an admission of fault, waiver or release.  
 93-2201-10. Parts of act not severable.

## 93-2201-1. (10680) An offer equivalent to tender.

## References

*Schultz v. Campbell*, 147 M 439, 413 P 2d 879.

## 93-2201-3. (10682) Objections to tender must be specified.

## Acts Constituting Waiver

Party who was obligated to sell shares of stock under repurchase agreement waived objections to tender by failing to object to terms of tender, conduct evidencing his willingness to sell and requesting a change in payment terms. *State ex rel. Howeth v. D. A. Davidson & Co.*, — M —, 517 P 2d 722.

## Waiver of Tender

Ordinarily, a check is not a tender, but it may be as effective as a tender of currency if there is no timely objection to the form of tender, or if the objection is waived. *Schultz v. Campbell*, 147 M 439, 413 P 2d 879.

## 93-2201-4. (10683) Rules for construing description of lands.

## Ambiguous References to Physical Monuments

Where two deeds, dated 1899 and 1903, conveyed those portions of a given lot, east and west, respectively, of a specified "wagon road," the phrase had reference to a "wagon road" appearing on the 1886 general survey of the area in question, not the present county road, though there was evidence that by the time of the deeds the present road was in use; the acreages specified in the deeds conform to those portions of the lot east and west of the 1886 road, and, in addition, since the phrase "wagon road" had a meaning distinct from "county road" the scrivener

would have used the latter term had he intended to refer to the present road. *Johnson v. Jarrett*, — M —, 548 P 2d 144.

## Improper Description

Where there was improper land description in easement, trial court properly ordered survey of land in question so intent of parties to easement could be effectuated. *City of Missoula v. Rose*, — M —, 519 P 2d 146.

## Monuments Paramount

A resurvey which paid no attention to artificial monuments relied upon in deeds

and used by the owners of the property could not disrupt or change existing property lines. *Buckley v. Laird*, 158 M 483, 493 P 2d 1070.

#### Order of Survey

Trial court properly ordered survey

of land allegedly subject to an easement where the description of the land subject to the easement was defective but could be determined pursuant to subsections 2 and 6 of this section. *City of Missoula v. Rose*, — M —, 519 P 2d 146.

### 93-2201-6. Repealed.

#### Repeal

Section 93-2201-6 (Sec. 3415, C. Civ. Proc. 1895), relating to sufficiency of an

admission as evidence of adultery in a divorce action, was repealed by Sec. 25, Ch. 33, Laws of 1977.

**93-2201-7. Settlement of claims—legislative policy.** The legislative assembly hereby declares that the health, welfare and safety of the people of the state of Montana would be enhanced by the expeditious handling of liability claims. The legislative assembly further declares that the handling of such claims would be expedited if voluntary payment by or on behalf of one person to or on behalf of a person who has sustained injury to his person or damage to his property could not be construed as an admission of fault or liability as to any claim arising out of the occurrence which gave rise to such injury or damage.

**History:** En. Sec. 1, Ch. 222, L. 1973.

#### Title of Act

An act to provide for the voluntary pay-

ment of personal injury or property damage claims without such payment constituting an admission of liability.

**93-2201-8. "Person" defined.** As used in this act, the word "person" includes any individual, partnership, joint venture, unincorporated association, private or municipal corporation, the state and its political subdivisions.

**History:** En. Sec. 2, Ch. 222, L. 1973.

**93-2201-9. Voluntary partial payment of claim not an admission of fault, waiver or release.** No voluntary partial payment of a claim against any person based on alleged liability of that person for injury to person, including death, or damage to property arising out of any occurrence shall be construed as an admission of fault or liability, or as a waiver or release of claim by the person to whom or in whose behalf such payment was made. No voluntary partial payment shall be construed to reduce the amount of damages which may be pleaded or proved in any action arising out of such occurrence. The fact of any such voluntary payment, or its amount, shall not be admissible as evidence on the trial of any action arising out of such occurrence, whether on the issue of liability, the extent of the damage or otherwise. Upon final settlement between the parties of a claim arising out of such occurrence, the parties may make any agreement they wish with respect to all voluntary partial payments. After entry of a judgment in an action for damages for personal injuries, including death, or for damage to property arising out of any occurrence, any voluntary partial payment theretofore made shall be treated as a credit against such judgment, and shall be deductible from the amount of such judgment. If after partial voluntary payments are made as herein

provided for, it shall be determined by a court of competent jurisdiction that the person who made such payments, or on whose behalf such payments were made, is liable for an amount which is less than the amount of the voluntary payments already made, such person shall have no right of action for the recovery of the amount by which the voluntary payments exceeded the amount of the judgment.

History: En. Sec. 3, Ch. 222, L. 1973.

93-2201-10. **Parts of act not severable.** It is the intent of the legislative assembly that each part of this act is essentially dependent upon every other part, and if one part is held unconstitutional or invalid, all other parts are invalid.

History: En. Sec. 4, Ch. 222, L. 1973.

## CHAPTER 2501—QUESTIONS OF FACT AND LAW—DECISION OF

### 93-2501-2. (10699) Questions of law addressed to the court.

#### Admissibility of Sound Recorded Evidence

In order for sound recordings to be admissible into evidence there must be showing of (1) the capability of the recording device; (2) the competency of the operator; (3) the authenticity of the recording; (4) the fact that no changes or deletions have been made; (5) the manner

of the preservation of the recording; and (6) the identification of the speakers. *State v. Smith*, — M —, 523 P 2d 1395.

#### Interpretation of Lease

Interpretation of lease of building was matter for court in dispute between lessor and lessee. *Solich v. Hale*, 150 M 358, 435 P 2d 883.

## CHAPTER 2601—REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT

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|---------|--|
| Section | 93-2601-41. Purposes.  |
|         | 93-2601-42. Definitions.   |
|         | 93-2601-43. Remedies additional to those now existing.                         |
|         | 93-2601-44. Extent of duties of support.                                       |
|         | 93-2601-45. Interstate rendition.  |
|         | 93-2601-46. Conditions of interstate rendition.                                |
|         | 93-2601-47. Choice of law.   |
|         | 93-2601-48. Remedies of state or political subdivision furnishing support.     |
|         | 93-2601-49. How duties of support enforced.                                    |
|         | 93-2601-50. Jurisdiction.  |
|         | 93-2601-51. Contents and filing of petition for support—venue.                 |
|         | 93-2601-52. Officials to represent obligee.                                    |
|         | 93-2601-53. Petition for a minor.  |
|         | 93-2601-54. Duty of initiating court.  |
|         | 93-2601-55. Costs and fees.  |
|         | 93-2601-56. Jurisdiction by arrest.  |
|         | 93-2601-57. State information agency.  |
|         | 93-2601-58. Duty of the court and officials of this state as responding state. |
|         | 93-2601-59. Further duties of court and officials in the responding state.     |
|         | 93-2601-60. Hearing and continuance.   |
|         | 93-2601-61. Immunity from criminal prosecution.                                |
|         | 93-2601-62. Evidence of husband and wife.                                      |
|         | 93-2601-63. Rules of evidence.   |
|         | 93-2601-64. Order of support.  |
|         | 93-2601-65. Responding court to transmit copies to initiating court.           |
|         | 93-2601-66. Additional powers of responding court.                             |
|         | 93-2601-67. Paternity.   |
|         | 93-2601-68. Additional duties of responding court.                             |
|         | 93-2601-69. Additional duty of initiating court.                               |



- 93-2601-70. Proceedings not to be stayed.
- 93-2601-71. Application of payments.
- 93-2601-72. Effect of participation in proceeding.
- 93-2601-73. Intrastate application.
- 93-2601-74. Appeals.
- 93-2601-75. Additional remedies.
- 93-2601-76. Registration.
- 93-2601-77. Registry of foreign support orders.
- 93-2601-78. Official to represent obligee.
- 93-2601-79. Registration procedure—notice.
- 93-2601-80. Effect of registration—enforcement procedure.
- 93-2601-81. Uniformity of interpretation.
- 93-2601-82. Short title.

### 93-2601-1 to 93-2601-40. Repealed.

#### Repeal

Sections 93-2601-1 to 93-2601-40 (Sec. 1, Ch. 208, L. 1961), known as the "Uni-

form Reciprocal Enforcement of Support Act," were repealed by Sec. 44, Ch. 237, Laws 1969.

**93-2601-41. Purposes.** The purposes of this act are to improve and extend by reciprocal legislation the enforcement of duties of support.

**History:** En. Sec. 1, Ch. 237, L. 1969.

#### Compiler's Notes

Section 93-2601-41 to 93-2601-44 comprise Part I of this chapter, as enacted by Ch. 237, Laws 1969, entitled "General provisions."

**NOTE.**—The following states have enacted the Revised Uniform Reciprocal Enforcement of Support Act: Arizona, Idaho, Illinois, Kansas, Nevada, New Mexico, North Dakota, Wisconsin.

#### Title of Act

An act adopting the Uniform Reciprocal Enforcement of Support Act as revised by

the National Conference of Commissioners on Uniform State Laws in 1968; providing additional remedies for enforcement of duties of support; providing for criminal enforcement by extradition; providing for civil enforcement where parties reside in different states or in different counties of Montana; providing for registration and enforcement of foreign support orders and support orders issued in different counties of Montana; providing for the resolution of paternity and visitation rights if contested, and for appeals; and repealing sections 93-2601-1 through 93-2601-40, R. C. M. 1947.

**93-2601-42. Definitions.** (a) "Court" means the district court of this state and when the context requires means the court of any other state as defined in a substantially similar reciprocal law.

(b) "Duty of support" means a duty of support whether imposed or imposable by law or by order, decree, or judgment of any court, whether interlocutory or final or whether incidental to an action for divorce, separation, separate maintenance, or otherwise and includes the duty to pay arrearages of support past due and unpaid.

(c) "Governor" includes any person performing the functions of governor or the executive authority of any state covered by this act.

(d) "Initiating state" means a state in which a proceeding pursuant to this or a substantially similar reciprocal law is commenced. "Initiating court" means the court in which a proceeding is commenced.

(e) "Law" includes both common and statutory law.

(f) "Obligee" means a person including a state or political subdivision to whom a duty of support is owed or a person including a state or political subdivision that has commenced a proceeding for enforcement of an alleged duty of support or for registration of a support or-

der. It is immaterial if the person to whom a duty of support is owed is a recipient of public assistance.

(g) "Obligor" means any person owing a duty of support or against whom a proceeding for the enforcement of a duty of support or registration of a support order is commenced.

(h) "Prosecuting attorney" means the public official in the appropriate place who has the duty to enforce criminal laws relating to the failure to provide for the support of any person.

(i) "Register" means to file in the registry of foreign support orders.

(j) "Registering court" means any court of this state in which a support order of a rendering state is registered.

(k) "Rendering state" means a state in which the court has issued a support order for which registration is sought or granted in the court of another state.

(l) "Responding state" means a state in which any responsive proceeding pursuant to the proceeding in the initiating state is commenced. "Responding court" means the court in which the responsive proceeding is commenced.

(m) "State" includes a state, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any foreign jurisdiction in which this or a substantially similar reciprocal law is in effect.

(n) "Support order" means any judgment, decree, or order of support in favor of an obligee whether temporary or final, or subject to modification, revocation, or remission, regardless of the kind of action or proceeding in which it is entered.

History: En Sec. 2, Ch. 237, L. 1969.

**93-2601-43. Remedies additional to those now existing.** The remedies herein provided are in addition to and not in substitution for any other remedies.

History: En. Sec. 3, Ch. 237, L. 1969.

**93-2601-44. Extent of duties of support.** Duties of support arising under the law of this state, when applicable under section 7 [93-2601-47], bind the obligor present in this state regardless of the presence or residence of the obligee.

History: En. Sec. 4, Ch. 237, L. 1969.

**93-2601-45. Interstate rendition.** The governor of this state may

(1) demand of the governor of another state the surrender of a person found in that state who is charged criminally in this state with failing to provide for the support of any person; or

(2) surrender on demand by the governor of another state a person found in this state who is charged criminally in that state with failing to provide for the support of any person. Provisions for extradi-

tion of criminals not inconsistent with this act apply to the demand even if the person whose surrender is demanded was not in the demanding state at the time of the commission of the crime and has not fled therefrom. The demand, the oath, and any proceedings for extradition pursuant to this section need not state or show that the person whose surrender is demanded has fled from justice or at the time of the commission of the crime was in the demanding state.

**History:** En. Sec. 5, Ch. 237, L. 1969.

**Compiler's Notes**

Sections 93-2601-45 and 93-2601-46 com-

prise Part II of this chapter, as enacted by Ch. 237, Laws 1969, entitled "Criminal enforcement."

**93-2601-46. Conditions of interstate rendition.** (a) Before making the demand upon the governor of another state for the surrender of a person charged criminally in this state with failing to provide for the support of a person, the governor of this state may require any prosecuting attorney of this state to satisfy him that at least sixty (60) days prior thereto the obligee initiated proceedings for support under this act or that any proceeding would be of no avail.

(b) If, under a substantially similar act, the governor of another state makes a demand upon the governor of this state for the surrender of a person charged criminally in that state with failure to provide for the support of a person, the governor may require any prosecuting attorney to investigate the demand and to report to him whether proceedings for support have been initiated or would be effective. If it appears to the governor that a proceeding would be effective but has not been initiated he may delay honoring the demand for a reasonable time to permit the initiation of a proceeding.

(c) If proceedings have been initiated and the person demanded has prevailed therein the governor may decline to honor the demand. If the obligee prevailed and the person demanded is subject to a support order, the governor may decline to honor the demand if the person demanded is complying with the support order.

**History:** En. Sec. 6, Ch. 237, L. 1969.

**93-2601-47. Choice of law.** Duties of support applicable under this act are those imposed under the laws of any state where the obligor was present for the period during which support is sought. The obligor is presumed to have been present in the responding state during the period for which support is sought until otherwise shown.

**History:** En. Sec. 7, Ch. 237, L. 1969.

**Compiler's Notes**

Sections 93-2601-47 to 93-2601-74 com-

prise Part III of this chapter, as enacted by Ch. 237, Laws 1969, entitled "Civil enforcement."

**93-2601-48. Remedies of state or political subdivision furnishing support.** If a state or a political subdivision furnishes support to an individual obligee it has the same right to initiate a proceeding under this



act as the individual obligee for the purpose of securing reimbursement for support furnished and of obtaining continuing support.

**History:** En. Sec. 8, Ch. 237, L. 1969.

**Waiver of Right**

Although state had the right to recover amounts paid through ADC for support and necessities of children, where state did not initiate action and did not join in

mother's suit against father for payment of child support, equitable subrogation of proceeds was not allowed by the court. State, Department of Social & Rehabilitation Services v. Hultgren, — M —, 541 P 2d 1211.

**93-2601-49. How duties of support enforced.** All duties of support, including the duty to pay arrearages, are enforceable by a proceeding under this act including a proceeding for civil contempt. The defense that the parties are immune to suit because of their relationship as husband and wife or parent and child is not available to the obligor.

**History:** En. Sec. 9, Ch. 237, L. 1969.

**93-2601-50. Jurisdiction.** Jurisdiction of any proceeding under this act is vested in the district court.

**History:** En. Sec. 10, Ch. 237, L. 1969.

**93-2601-51. Contents and filing of petition for support—venue.** (1) The petition shall be verified and shall state the name and, so far as known to the obligee, the address and circumstances of the obligor and the persons for whom support is sought, and all other pertinent information. The obligee may include in or attach to the petition any information which may help in locating or identifying the obligor including a photograph of the obligor, a description of any distinguishing marks on his person, other names and aliases by which he has been or is known, the name of his employer, his fingerprints, and his social security number.

(2) At the time of filing the petition the obligee shall also file with the court an affidavit as required by 71-511 stating whether he has received public assistance from any source and, if he has received public assistance, that he has notified the department of social and rehabilitation services in writing of the pending action.

(3) The petition may be filed in the appropriate court of any state in which the obligee resides. The court may not decline or refuse to accept and forward the petition on the ground that it should be filed with some other court of this or any other state where there is pending another action for divorce, separation, annulment, dissolution, habeas corpus, adoption, or custody between the same parties or where another court has already issued a support order in some other proceeding and has retained jurisdiction for its enforcement.

**History:** En. Sec. 6, Ch. 237, L. 1969; amd. Sec. 6, Ch. 379, L. 1977.

**Amendments**

The 1977 amendment inserted subsection (2); and made minor changes in style and phraseology.

**Saving Clause**

Section 7 of Ch. 379, Laws 1977 read

"This act does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before July 1, 1977."

**Separability Clause**

Section 8 of Ch. 379, Laws 1977 read "If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act

is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications."

**93-2601-52. Officials to represent obligee.** If this state is acting as an initiating state the prosecuting attorney upon the request of the court, a state department of welfare, a county commissioner, or other local welfare officer, shall represent the obligee in any proceeding under this act. If the prosecuting attorney neglects or refuses to represent the obligee the attorney general may order him to comply with the request of the court or may undertake the representation.

**History:** En. Sec. 12, Ch. 237, L. 1969.

**93-2601-53. Petition for a minor.** A petition on behalf of a minor obligee may be executed and filed by a person having legal custody of the minor without appointment as guardian ad litem.

**History:** En. Sec. 13, Ch. 237, L. 1969.

**93-2601-54. Duty of initiating court.** If the initiating court finds that the petition sets forth facts from which it may be determined that the obligor owes a duty of support and that a court of the responding state may obtain jurisdiction of the obligor or his property it shall so certify and cause three (3) copies of the petition and its certificate and one (1) copy of this act to be sent to the responding court. Certification shall be in accordance with the requirements of the initiating state. If the name and address of the responding court is unknown and the responding state has an information agency comparable to that established in the initiating state it shall cause the copies to be sent to the state information agency or other proper official of the responding state, with a request that the agency or official forward them to the proper court and that the court of the responding state acknowledge their receipt to the initiating court.

**History:** En. Sec. 14, Ch. 237, L. 1969.

**93-2601-55. Costs and fees.** An initiating court shall not require payment of either a filing fee or other costs from the obligee but may request the responding court to collect fees and costs from the obligor. A responding court shall not require payment of a filing fee or other costs from the obligee but it may direct that all fees and costs requested by the initiating court and incurred in this state when acting as a responding state, including fees for filing of pleadings, service of process, seizure of property, stenographic or duplication service, or other service supplied to the obligor, be paid in whole or in part by the obligor or by the state or political subdivision thereof. These costs or fees do not have priority over amounts due to the obligee.

**History:** En. Sec. 15, Ch. 237, L. 1969.

**93-2601-56. Jurisdiction by arrest.** If the court of this state believes that the obligor may flee it may

(1) as an initiating court, request in its certificate that the responding court obtain the body of the obligor by appropriate process; or

(2) as a responding court, obtain the body of the obligor by appropriate process. Thereupon it may release him upon his own recognizance or upon his giving a bond in an amount set by the court to assure his appearance at the hearing.

**History:** En. Sec. 16, Ch. 237, L. 1969.

**93-2601-57. State information agency.** (a) The state department of social and rehabilitation services is designated as the state information agency under this act, [and] it shall

(1) compile a list of the courts and their addresses in this state having jurisdiction under this act and transmit it to the state information agency of every other state which has adopted this or a substantially similar act. Upon the adjournment of each session of the legislature the agency shall distribute copies of any amendments to the act and a statement of their effective date to all other state information agencies;

(2) maintain a register of lists of courts received from other states and transmit copies thereof promptly to every court in this state having jurisdiction under this act; and

(3) forward to the court in this state which has jurisdiction over the obligor or his property petitions, certificates and copies of the act it receives from courts or information agencies of other states.

(b) If the state information agency does not know the location of the obligor or his property in the state and no state location service is available it shall use all means at its disposal to obtain this information, including the examination of official records in the state and other sources such as telephone directories, real property records, vital statistics records, police records, requests for the name and address from employers who are able or willing to co-operate, records of motor vehicle license offices, requests made to the tax offices both state and federal where such offices are able to co-operate, and requests made to the social security administration as permitted by the Social Security Act as amended.

(c) After the deposit of three (3) copies of the petition and certificate and one (1) copy of the act of the initiating state with the clerk of the appropriate court, if the state information agency knows or believes that the prosecuting attorney is not prosecuting the case diligently it shall inform the attorney general who may undertake the representation.

**History:** En. Sec. 17, Ch. 237, L. 1969; amd. Sec. 48, Ch. 121, L. 1974.

tion, is compiled in the United States Code as Tit. 42, sec. 1306.

#### **Compiler's Notes**

The compiler inserted the bracketed word "and" in subsection (a).

The Social Security Act, as amended, referred to in subsection (b) of this sec-

#### **Amendments**

The 1974 amendment substituted "state department of social and rehabilitation services" for "state department of public welfare."



**93-2601-58. Duty of the court and officials of this state as responding state.** (a) After the responding court receives copies of the petition, certificate and act from the initiating court the clerk of the court shall docket the case and notify the prosecuting attorney of his action.

(b) The prosecuting attorney shall prosecute the case diligently. He shall take all action necessary in accordance with the laws of this state to enable the court to obtain jurisdiction over the obligor or his property and shall request the court to set a time and place for a hearing and give notice thereof to the obligor in accordance with law.

(c) If the prosecuting attorney neglects or refuses to represent the obligee the attorney general may order him to comply with the request of the court or may undertake the representation.

**History:** En. Sec. 18, Ch. 237, L. 1969.

**93-2601-59. Further duties of court and officials in the responding state.** (a) The prosecuting attorney on his own initiative shall use all means at his disposal to locate the obligor or his property, and if because of inaccuracies in the petition or otherwise the court cannot obtain jurisdiction the prosecuting attorney shall inform the court of what he has done and request the court to continue the case pending receipt of more accurate information or an amended petition from the initiating court.

(b) If the obligor or his property is not found in the county, and the prosecuting attorney discovers that the obligor or his property may be found in another county of this state or in another state he shall so inform the court. Thereupon the clerk of the court shall forward the documents received from the court in the initiating state to a court in the other county or to a court in the other state or to the information agency or other proper official of the other state with a request that the documents be forwarded to the proper court. All powers and duties provided by this act apply to the recipient of the documents so forwarded. If the clerk of a court of this state forwards documents to another court he shall forthwith notify the initiating court.

(c) If the prosecuting attorney has no information as to the location of the obligor or his property he shall so inform the initiating court.

**History:** En. Sec. 19, Ch. 237, L. 1969.

**93-2601-60. Hearing and continuance.** If the obligee is not present at the hearing and the obligor denies owing the duty of support alleged in the petition or offers evidence constituting a defense, the court, upon request of either party, may continue the hearing to permit evidence relative to the duty to be adduced by either party by deposition or by appearing in person before the court. The court may designate the judge of the initiating court as a person before whom a deposition may be taken.

**History:** En. Sec. 20, Ch. 237, L. 1969; a minor change in punctuation. amd. Sec. 24, Ch. 33, L. 1977.

#### **Amendments**

The 1977 amendment inserted "may" before "continue the hearing to permit evidence" in the first sentence; and made

#### **Repealing Clause**

Section 25 of Ch. 33, Laws 1977 read "Sections 36-110, 36-130, 36-131, 48-112, 48-123, 48-144, and 93-2201-6, R. C. M. 1947, are repealed."

**93-2601-61. Immunity from criminal prosecution.** If at the hearing the obligor is called for examination as an adverse party and he declines to answer upon the ground that his testimony may tend to incriminate him, the court may require him to answer, in which event he is immune from criminal prosecution with respect to matters revealed by his testimony, except for perjury committed in this testimony.

**History:** En. Sec. 21, Ch. 237, L. 1969.

**93-2601-62. Evidence of husband and wife.** Laws attaching a privilege against the disclosure of communications between husband and wife are inapplicable to proceedings under this act. Husband and wife are competent witnesses and may be compelled to testify to any relevant matter, including marriage and parentage.

**History:** En. Sec. 22, Ch. 237, L. 1969.

**93-2601-63. Rules of evidence.** In any hearing for the civil enforcement of this act the court is governed by the rules of evidence applicable in a civil court action in the district court. If the action is based on a support order issued by another court a certified copy of the order shall be received as evidence of the duty of support, subject only to any defenses available to an obligor with respect to paternity (section 27 [93-2601-67]) or to a defendant in an action or a proceeding to enforce a foreign money judgment. The determination or enforcement of a duty of support owed to one obligee is unaffected by any interference by another obligee with rights of custody or visitation granted by a court.

**History:** En. Sec. 23, Ch. 237, L. 1969.

**93-2601-64. Order of support.** If the responding court finds a duty of support it may order the obligor to furnish support or reimbursement therefor and subject the property of the obligor to the order. Support orders made pursuant to this act shall require that payments be made to the clerk of the court of the responding state. The court and prosecuting attorney of any county in which the obligor is present or has property have the same powers and duties to enforce the order as have those of the county in which it was first issued. If enforcement is impossible or cannot be completed in the county in which the order was issued, the prosecuting attorney shall send a certified copy of the order to the prosecuting attorney of any county in which it appears that proceedings to enforce the order would be effective. The prosecuting attorney to whom the certified copy of the order is forwarded shall proceed with enforcement and report the results of the proceedings to the court first issuing the order.

**History:** En. Sec. 24, Ch. 237, L. 1969.

**93-2601-65. Responding court to transmit copies to initiating court.** The responding court shall cause a copy of all support orders to be sent to the initiating court.

**History:** En. Sec. 25, Ch. 237, L. 1969.

**93-2601-66. Additional powers of responding court.** In addition to the foregoing powers a responding court may subject the obligor to any terms and conditions proper to assure compliance with its orders and in particular to:

(1) require the obligor to furnish a cash deposit or a bond of a character and amount to assure payment of any amount due;

(2) require the obligor to report personally and to make payments at specified intervals to the clerk; and

(3) punish under the power of contempt the obligor who violates any order of the court.

**History:** En. Sec. 26, Ch. 237, L. 1969.

**93-2601-67. Paternity.** If the obligor asserts as a defense that he is not the father of the child for whom support is sought and it appears to the court that the defense is not frivolous, and if both of the parties are present at the hearing or the proof required in the case indicates that the presence of either or both of the parties is not necessary, the court may adjudicate the paternity issue. Otherwise the court may adjourn the hearing until the paternity issue has been adjudicated.

**History:** En. Sec. 27, Ch. 237, L. 1969.

**93-2601-68. Additional duties of responding court.** A responding court has the following duties which may be carried out through the clerk of the court:

(1) to transmit to the initiating court any payment made by the obligor pursuant to any order of the court or otherwise; and

(2) to furnish to the initiating court upon request a certified statement of all payments made by the obligor.

**History:** En. Sec. 28, Ch. 237, L. 1969.

**93-2601-69. Additional duty of initiating court.** An initiating court shall receive and disburse forthwith all payments made by the obligor or sent by the responding court. This duty may be carried out through the clerk of the court.

**History:** En. Sec. 29, Ch. 237, L. 1969.

**93-2601-70. Proceedings not to be stayed.** A responding court shall not stay the proceeding or refuse a hearing under this act because of any pending or prior action or proceeding for divorce, separation, annulment, dissolution, habeas corpus, adoption, or custody in this or any other state. The court shall hold a hearing and may issue a support order pendente lite. In aid thereof it may require the obligor to give a bond for the prompt prosecution of the pending proceeding. If the other action or proceeding is concluded before the hearing in the instant proceeding and the judgment therein provides for the support demanded in the petition being heard the court must conform its support order to the amount allowed in the other action or proceeding. Thereafter the court shall not stay enforcement of its support order because of the retention



of jurisdiction for enforcement purposes by the court in the other action or proceeding.

**History:** En. Sec. 30, Ch. 237, L. 1969.

**93-2601-71. Application of payments.** A support order made by a court of this state pursuant to this act does not nullify and is not nullified by a support order made by a court of this state pursuant to any other law or by a support order made by a court of any other state pursuant to a substantially similar act or any other law, regardless of priority of issuance, unless otherwise specifically provided by the court. Amounts paid for a particular period pursuant to any support order made by the court of another state shall be credited against the amounts accruing or accrued for the same period under any support order made by the court of this state.

**History:** En. Sec. 31, Ch. 237, L. 1969.

**93-2601-72. Effect of participation in proceeding.** Participation in any proceeding under this act does not confer jurisdiction upon any court over any of the parties thereto in any other proceeding.

**History:** En. Sec. 32, Ch. 237, L. 1969.

**93-2601-73. Intrastate application.** This act applies if both the obligee and the obligor are in this state but in different counties. If the court of the county in which the petition is filed finds that the petition sets forth facts from which it may be determined that the obligor owes a duty of support and finds that a court of another county in this state may obtain jurisdiction over the obligor or his property, the clerk of the court shall send the petition and a certification of the findings to the court of the county in which the obligor or his property is found. The clerk of the court of the county receiving these documents shall notify the prosecuting attorney of their receipt. The prosecuting attorney and the court in the county to which the copies are forwarded then shall have duties corresponding to those imposed upon them when acting for this state as a responding state.

**History:** En. Sec. 33, Ch. 237, L. 1969.

**93-2601-74. Appeals.** If the attorney general is of the opinion that a support order is erroneous and presents a question of law warranting an appeal in the public interest, he may

(a) perfect an appeal to the proper appellate court if the support order was issued by a court of this state, or

(b) if the support order was issued in another state, cause the appeal to be taken in the other state. In either case expenses of appeal may be paid on his order from funds appropriated for his office.

**History:** En. Sec. 34, Ch. 237, L. 1969.

**93-2601-75. Additional remedies.** If the duty of support is based on a foreign support order, the obligee has the additional remedies provided in the following sections.

**History:** En. Sec. 35, Ch. 237, L. 1969.

**Compiler's Notes**

Sections 93-2601-75 to 93-2601-82 com-

prise Part IV of this chapter, as enacted by Ch. 237, Laws 1969, entitled "Registration of foreign support orders."

**93-2601-76. Registration.** The obligee may register the foreign support order in a court of this state in the manner, with the effect, and for the purposes herein provided.

**History:** En. Sec. 36, Ch. 237, L. 1969.

**93-2601-77. Registry of foreign support orders.** The clerk of the court shall maintain a registry of foreign support orders in which he shall file foreign support orders.

**History:** En. Sec. 37, Ch. 237, L. 1969.

**93-2601-78. Official to represent obligee.** If this state is acting either as a rendering or a registering state the prosecuting attorney upon the request of the court, a state department of social and rehabilitation services, a county commissioner, or other local welfare official shall represent the obligee in proceeding under this part.

If the prosecuting attorney neglects or refuses to represent the obligee, the attorney general may order him to comply with the request of the court or may undertake the representation.

**History:** En. Sec. 38, Ch. 237, L. 1969; amd. Sec. 48, Ch. 121, L. 1974.

"state department of social and rehabilitation services" for "state department of welfare."

**Amendments**

The 1974 amendment substituted

**93-2601-79. Registration procedure — notice.** (a) An obligee seeking to register a foreign support order in a court of this state shall transmit to the clerk of the court (1) three (3) certified copies of the order with all modifications thereof, (2) one (1) copy of the reciprocal enforcement of support act of the state in which the order was made, and (3) a statement verified and signed by the obligee, showing the post-office address of the obligee, the last known place of residence and post-office address of the obligor, the amount of support remaining unpaid, a description and the location of any property of the obligor available upon execution, and a list of the states in which the order is registered. Upon receipt of these documents the clerk of the court, without payment of a filing fee or other cost to the obligee, shall file them in the registry of foreign support orders. The filing constitutes registration under this act.

(b) Promptly upon registration the clerk of the court shall send by certified or registered mail to the obligor at the address given a notice of the registration with a copy of the registered support order and the post-office address of the obligee. He shall also docket the case and notify the prosecuting attorney of his action. The prosecuting attorney shall proceed diligently to enforce the order.

**History:** En. Sec. 39, Ch. 237, L. 1969.

**93-2601-80. Effect of registration — enforcement procedure.** (a) Upon registration the registered foreign support order shall be treated in the same manner as a support order issued by a court of this state. It has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a support order of this state and may be enforced and satisfied in like manner.

(b) The obligor has twenty (20) days after the mailing of notice of the registration in which to petition the court to vacate the registration or for other relief. If he does not so petition the registered support order is confirmed.

(c) At the hearing to enforce the registered support order the obligor may present only matters that would be available to him as defenses in an action to enforce a foreign money judgment. If he shows to the court that an appeal from the order is pending or will be taken or that a stay of execution has been granted the court shall stay enforcement of the order until the appeal is concluded, the time for appeal has expired, or the order is vacated, upon satisfactory proof that the obligor has furnished security for payment of the support ordered as required by the rendering state. If he shows to the court any ground upon which enforcement of a support order of this state may be stayed the court shall stay enforcement of the order for an appropriate period if the obligor furnishes the same security for payment of the support ordered that is required for a support order of this state.

**History:** En. Sec. 40, Ch. 237, L. 1969.

**93-2601-81. Uniformity of interpretation.** This act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

**History:** En. Sec. 41, Ch. 237, L. 1969.

**93-2601-82. Short title.** This act may be cited as the Revised Uniform Reciprocal Enforcement of Support Act (1968).

**History:** En. Sec. 42, Ch. 237, L. 1969.

#### **Separability Clause**

Section 43 of Ch. 237, Laws 1969 read "If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act which can be given effect with-

out the invalid provision or application, and to this end the provisions of this act are severable."

#### **Repealing Clause**

Section 44 of Ch. 237, Laws 1969 read "Sections 93-2601-1 through 93-2601-40, R. C. M. 1947, are repealed."





## CHAPTER 2701

### MONTANA RULES OF CIVIL PROCEDURE

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#### II. COMMENCEMENT OF ACTION—SERVICE OF PROCESS, PLEADINGS, MOTIONS AND ORDERS

##### Rule

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    - (6)
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## RULES OF CIVIL PROCEDURE

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- (e) FORM OF AFFIDAVITS; FURTHER TESTIMONY; DEFENSE REQUIRED.
- (f) WHEN AFFIDAVITS ARE UNAVAILABLE.
- (g) AFFIDAVITS MADE IN BAD FAITH.

**59. New trials—Amendment of judgments.**

- (a) GROUNDS.
- (b) TIME FOR MOTION.
- (c) TIME FOR SERVING AFFIDAVITS.
- (d) TIME FOR HEARING ON MOTION.
- (e) ON INITIATIVE OF COURT.
- (f) ORDER GRANTING NEW TRIAL.
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**60. Relief from judgment or order.**

- (b) MISTAKES—INADVERTENCE—EXCUSABLE NEGLIGENCE—NEWLY DISCOVERED EVIDENCE—FRAUD, ETC.
- (c) TIME FOR HEARING AND DETERMINING MOTIONS.

### VIII. PROVISIONAL AND FINAL REMEDIES AND SPECIAL PROCEEDINGS

**68. Offer of judgment.**

### IX. APPEALS

**72. Appeal from a district court to the supreme court.**

### X. DISTRICT COURTS AND CLERKS

**77. District courts and clerks.**

- (d) NOTICE OF ORDERS OR JUDGMENTS.
- (e) TRANSMITTAL OF FILE ON REMOVAL.

### XI. GENERAL PROVISIONS

**86. Effective date—Statutes superseded.**

- (a) EFFECTIVE DATE AND APPLICATION TO PENDING PROCEEDINGS.
- (b) STATUTES SUPERSEDED.

**TABLE B. List of rules superseding statutes.****C. List of statutes superseded by rules.**

### I. SCOPE OF RULES—ONE FORM OF ACTION

**Rule 1. Scope of rules.****References**

Spaberg v. Johnson, 143 M 500, 392 P  
2d 78.



## II. COMMENCEMENT OF ACTION—SERVICE OF PROCESS, PLEADINGS, MOTIONS AND ORDERS

- Rule 4. Persons subject to jurisdiction—Process—Service.  
5. Service and filing of pleadings and other papers.  
6. Time.

### Rule 4. Persons subject to jurisdiction—Process—Service.

A. DEFINITION OF PERSON. As used in this rule, the word "person," whether or not a citizen or resident of this state and whether or not organized under the laws of this state, includes an individual whether operating in his own name or under a trade name; an individual's agent or personal representative; a corporation; a business trust; an estate; a trust; a partnership; an unincorporated association; and any two or more persons having a joint or common interest or any other legal or commercial entity.

**History:** En. Sec. 4, Ch. 13, L. 1961; amd. Sec. 1, Ch. 189, L. 1963; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965.

#### Amendment

The 1965 amendment restated this rule without change.

### B. JURISDICTION OF PERSONS.

(1) Subject to Jurisdiction. All persons found within the state of Montana are subject to the jurisdiction of the courts of this state. In addition, any person is subject to the jurisdiction of the courts of this state as to any claim for relief arising from the doing personally, through an employee, or through an agent, of any of the following acts:

- (a) the transaction of any business within this state;
- (b) the commission of any act which results in accrual within this state of a tort action;
- (c) the ownership, use or possession of any property, or of any interest therein, situated within this state;
- (d) contracting to insure any person, property or risk located within this state at the time of contracting;
- (e) entering into a contract for services to be rendered or for materials to be furnished in this state by such person; or
- (f) acting as director, manager, trustee, or other officer of any corporation organized under the laws of, or having its principal place of business within this state, or as executor or administrator of any estate within this state.

(2) Acquisition of Jurisdiction. Jurisdiction may be acquired by our courts over any person through service of process as herein provided; or by the voluntary appearance in an action by any person either personally, or through an attorney, or through any other authorized officer, agent or employee.

**History:** En. Sec. 4, Ch. 13, L. 1961; amd. Sec. 1, Ch. 189, L. 1963; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965.

#### Amendment

The 1965 amendment restated this rule without apparent change.

#### Affidavit in Denial of Jurisdiction

Affidavit of corporation stating that it had no "representative resident" in Montana, but also stating that "orders received from dealers in Montana are accepted in Indiana," did not satisfactorily answer plaintiff's allegation that defendant had an agent in Montana, nor did it an-

swer the allegation under subdivision (1) (b) that defendant had violated its warranties and committed torts against the plaintiff in Montana. *Harrington v. Holiday Rambler Corp.*, — M —, 525 P 2d 556.

### Contracts

Although primary negotiations for sale of membership in stock exchange were had in Utah, locus of contract was in Montana and jurisdiction was acquired under this section in view of fact that negotiations continued via telephone and mail in Montana, that delivery was contemplated and would be made in Montana, and that purchase money mortgage or equivalent lien would follow subject matter of contract to Montana. *State ex rel. Goff v. District Court*, 157 M 495, 487 P 2d 292.

### Nonresident Corporation Jurisdiction

Montana court acquired in personam jurisdiction over nonresident corporation under portions of rule subjecting persons, who transact any business within Montana and persons entering into contracts for services to be rendered in Montana, to jurisdiction of Montana notwithstanding corporation's contention that most of its Montana business and services it rendered and materials it furnished were within federal enclave known as Malstrom Air Force Base. *Swanson Painting Co. v. Painters Local Union No. 260*, 391 F 2d 523.

In products liability suit instituted by resident, state properly exercised in personam jurisdiction over nonresident manufacturer under long-arm provision relating to commission of act resulting in accrual within state of tort action notwithstanding manufacturer's contention that action offended due process requirements of "fundamental fairness" and "minimum contacts"; action was proper despite facts that defendant maintained no office in state, had no representative resident in or assigned to Montana, received orders from wholesale or retail outlets in Illinois, and had Montana business consisting of less than one-half of one per cent of its total business where foreign corporation deliberately engaged in a policy which was intended to put so much of its product into the state as the market would absorb. *Bullard v. Rhodes Pharmacal Co.*, 263 F Supp 79, distinguished in 341 F Supp 560, 562.

Long-arm jurisdiction obtained over nonresident defendant for commission of act which results in accrual within state of tort action and for entering into contract for services to be rendered or for materials to be furnished in state did not violate due process requirements as embodied in "minimum contacts" test in view of

evidence that defendant manufactured products for national and interstate market; that valve was ordered by specifications; that defendant knew at time of shipment that it would be used in Montana; that defendant knew that negligent manufacture might constitute a serious hazard; and that the explosion allegedly resulting from defective valve occurred in Montana. *Continental Oil Co. v. Atwood & Morrill Co.*, 265 F Supp 692, distinguished in *Yules v. General Motors Corp.*, 297 F Supp 674.

Exercise of long-arm jurisdiction over nonresident defendant for commission of act which results in accrual within state of tort action did not violate due process requirements and was within "minimum contacts" rule in view of evidence that nonresident manufacturer knew that cableway it manufactured would be used on construction site in state and that it sent several of its employees to state to inspect cableway. *Hartung v. Washington Iron Works*, 267 F Supp 408.

Montana properly exercised in personam jurisdiction over nonresident assignee of retail installment sales contract in suit for assignee's conversion of truck by repossessing it under provision relating to commission of any act which results in accrual within state of tort action; action was proper notwithstanding assignee's due process contentions in that his activities in Montana were insufficient in view of evidence that when contract was assigned, the assignee knew vehicle would be used throughout United States; that assignee did not object when truck was moved to Montana and thereafter accepted payments mailed from Montana; that following accident in South Dakota, vehicle was removed to Montana at assignee's request; and that assignee had its agent, a wholly owned subsidiary, repossess truck in Montana and take necessary steps to obtain title to it. *Boyt v. Emmco Ins. Co.*, 271 F Supp 366.

A corporation is not "found within the state of Montana" unless it has agents or officers upon whom process may be served or unless its business has been of such character and extent as to warrant the inference that it has subjected itself to the jurisdiction of the state; such an inference cannot arise by the mere solicitation of business and shipment of product into the state and occasional trips by an officer or agent into the state for solicitation purposes. *McIntosh v. Heil Co.*, 350 F Supp 866.

In suit by landlord for breach of written lease by wholly owned subsidiary, federal district court lacked in personam jurisdiction over nonresident parent corporation, since formal separation had been maintained between parent corporation and



wholly owned subsidiary. *Crow Tribe of Indians v. Mohasco Industries, Inc.*, 406 F Supp 738.

### Retroactive Application

This rule applied to act of alleged malpractice occurring in Montana prior to effective date of this rule (Rule 86(a)) and doctor who had not resided in Montana since effective date of rule could be served properly with process, under Rule 4D(3), in California. *State ex rel. Johnson v. District Court of Fourth Judicial District*, 148 M 22, 417 P 2d 109, 111.

The giving effect to the service of summons provisions of this rule, when the operative facts of the case to which the rule was applied had taken place prior to the effective date of the Montana Rules of Civil Procedure as set out in Rule 86 (a) was not a prohibited retroactive application of this rule within the meaning of section 12-201. *Weber v. Hydroponics, Inc.*, 226 F Supp 117, 118.

### Service of Process Within Exterior Boundaries of Indian Reservation

Service of process on Indian defendant in divorce action was effective where marriage took place off the reservation; service of process on Indian reservation was not violation of Indian tribe's sovereignty under United States law. *Bad Horse v. Bad Horse*, 163 M 445, 517 P 2d 893, certiorari denied, 419 US 847, 42 L Ed 2d 76, 95 S Ct 83, distinguished in, — US —, — L Ed 2d —, 96 S Ct 943.

## C. PROCESS.

(1) **Summons—Issuance.** Upon the filing of the complaint, the clerk shall forthwith issue a summons, and shall deliver the summons either to the sheriff of the county in which the action is filed, or to the person who is to serve it, or upon request, to the attorney for said party who shall thereafter be responsible to see that the summons is served in the manner prescribed by these rules. Upon request, separate or additional summons shall issue against any parties designated in the original action, or against any additional parties who may be brought into the action.

(2) **Summons—Form.** The summons shall be signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint. In an action brought to quiet title to real estate, there shall be added to the foregoing, the following: "This action is brought for the purpose of quieting title to land situated in \_\_\_\_\_ County, Montana, and described as follows: (Here insert descriptions

### Tort Accruing

Swedish corporation which sold ammunition throughout the United States through an American distributor subjected itself to Montana jurisdiction when defective ammunition sold in Idaho resulted in injury in Montana. *Scanlan v. Norma Projektil Fabrik*, 345 F Supp 292.

### Transacting Business

State had jurisdiction over person of nonresident defendant who placed purchase order directly with a Montana wholesaler once and paid by direct check to the wholesaler on several occasions, even though defendant had never personally met plaintiff nor been in the state. *Prentice Lumber Co. v. Spahn*, 156 M 68, 474 P 2d 141.

Personal services of employee doctor of hospital in Minnesota, rendered to plaintiff in Montana at plaintiff's convenience and incidental to employee's personal journey to Montana, was not sufficient to bring hospital under jurisdiction of Montana for a tort occurring in Minnesota. *Aylstock v. Mayo Foundation*, 341 F Supp 560.

### Law Review

Ganz, "Doing Business" in Illinois as a Basis of Jurisdiction Over Nonresidents—Due Process and Contracts," Vol. 1, No. 4 *Illinois Continuing Legal Education* 75 (October 1963).



of land.)” For exceptions to this form of summons see 4D(4) “Other Service,” set forth hereinafter.

**History:** En. Sec. 4, Ch. 13, L. 1961; amd. Sec. 1, Ch. 189, L. 1963; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

(h); and made minor changes in phraseology.

**Advisory Committee’s Note to September 29, 1967 Amendment**

Source: None.

#### Amendments

The 1965 amendment made minor changes in the caption to paragraph (2) and in references to R. C. M. 1947.

The amendment of September 29, 1967 substituted the last sentence in subdivision (2) for former sentence requiring compliance with sections 84-4165 and 93-6228 and with provisions of Rule 4D(5)

This amendment, together with the change in 4D(4), is intended to make it clear that there is no conflict between the requirements of the rules with respect to summons for publication and the requirements of section 93-6228, and that section 93-6228 governs actions to establish title to property granted to heirs of deceased entryman but has no application to other actions.

### D. SERVICE.

(1) By whom served. Service of all process shall be made by a sheriff of the County where the party to be served is found, by his deputy, by a constable authorized by law, or by any other person over the age of eighteen not a party to the action; except that a subpoena may be served as provided in Rule 45.

(2) Personal Service Within the State. The summons and complaint shall be served together, unless two or more defendants are residents of the same county, in which case a copy of the complaint need only be served upon one of such defendants. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(a) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process, provided that if the agent is one designated by statute to receive service, such further notice as the statute requires shall be given.

(b) Upon a minor over the age of 14 years, by delivering a copy of the summons and complaint to him personally, and by leaving a copy thereof at his dwelling house or usual place of abode with some adult of suitable discretion then residing therein, or by delivering a copy of the summons and complaint to an agent authorized by appointment or by law to receive service of process.

(c) Upon a minor under the age of 14 years, by delivering a copy of the summons and complaint to his guardian, if he has one within the state, and if not, then to his father or mother or other person or agency having his care or control, or with whom he resides, or if service cannot be made upon any of them, then as provided by order of the court.

(d) Upon a person who has been adjudged of unsound mind by a court of this state, or for whom a guardian has been appointed in this state by reason of incompetency, by delivering a copy of the summons and complaint to his guardian, if there be a guardian re-

siding in this state appointed and acting under the laws of this state. If there be no such guardian, the court shall appoint a guardian ad litem for the incompetent person, with or without personal service on the incompetent, as the court may direct. When a party is alleged to be of unsound mind, but has not been so adjudged by a court of this state, such party may be brought into court by service of process personally upon him. The court may also stay any action pending against a person on learning that such person is of unsound mind.

(e) Upon a domestic corporation, partnership or other unincorporated association, or upon a foreign corporation, partnership or other unincorporated association, established by the laws of any other state or country, and having a place of business within this state or doing business herein either permanently or temporarily, or which was doing business herein either permanently, or temporarily at the time the claim for relief accrued: (i) by delivering a copy of the summons and complaint to an officer, director, superintendent or managing or general agent, or partner, or associate for such corporation, partnership, or association; or by leaving such copies at the office or place of business of the corporation, partnership, or association within the state with the person in charge of such office; or (ii) by delivering a copy of the summons and complaint to the registered agent of said corporation named on the records of the Secretary of State, or to any other agent or attorney in fact authorized by appointment or by statute to receive or accept service on behalf of the corporation, partnership, or association, provided that if the agent or attorney in fact is one designated by statute to receive service, such further notice as the statute requires shall also be given; or (iii) if the sheriff shall make return that no person upon whom service may be made can be found in the county, then service may be made by leaving a copy of the summons and complaint at any office of the corporation, partnership, or unincorporated association within this state with the person in charge of such office; or (iv) if the suit is against a corporation whose charter or right to do business in the state has expired or been forfeited, by delivering a copy thereof to any one of the persons who have become trustees for the corporation and its stockholders or members.

(f) When a claim for relief is pending in any court of this state against a corporation organized under the laws of this state, or against a corporation organized under the laws of any other state or country, that has filed a copy of its charter in the office of the secretary of state of Montana and qualified to do business in Montana; or against a corporation organized under the laws of any other state or country which is subject to the jurisdiction of the courts of this state under the provisions of Rule 4B above, even though such corporation has never qualified to do business in Montana; or against a national banking corporation which, through insolvency or lapse of charter, has ceased to do business in Montana; and none of the persons designated in D(2)(e) immediately above can with the exercise of reasonable diligence be found within Montana, the party causing summons to be issued shall exercise reasonable diligence to ascertain the last known

address of any such person. Upon the filing with the clerk of court in which the claim for relief is pending of an affidavit reciting that none of the persons designated in D(2)(e) can after due diligence be found within Montana upon whom service of process can be made, and reciting the last known address of any such person, or reciting that after the exercise of reasonable diligence no such address for any such person could be found, and there has also been deposited with the said clerk the sum of \$5.00 to be paid to the secretary of state as a fee for each of said defendants for whom the secretary of state is to receive said service, then the clerk of court shall issue an order directing process to be served upon the secretary of state of the state of Montana or, in his absence from his office, upon the deputy secretary of state of the state of Montana. Such affidavit shall be sufficient evidence of the diligence of inquiry made by affiant, if the affidavit recites that diligent inquiry was made, and the affidavit need not detail the facts constituting such inquiry. Whenever service is also to be made through publication as provided in 4D(5), or upon other persons as provided in 4D(6), the affidavit herein required may be combined in the same instrument with the affidavit required under 4D(5)(c) and 4D(6). The said clerk of court shall then mail to the secretary of state the original summons, one copy of the summons and one copy of the affidavit for the files of the secretary of state, one copy of the summons attached to a copy of the complaint for each of the defendants to be served by service upon the secretary of state, and the fee for service, to the office of the secretary of state. The secretary of state shall mail copy of the summons and complaint by certified or registered mail with a return receipt requested to the last known address of any of the persons designated in D(2)(e) above, if known, or, if none such is known and it is a corporation not organized in Montana, to the secretary of state of the state in which such corporation was originally incorporated, if known; and the secretary of state shall make his return as hereinafter provided under Rule 4D(6). When service is so made, it shall be deemed personal service on such corporation, and the said secretary of state, or his deputy when the secretary is absent from his office, is hereby appointed agent of such corporation for service of process in cases hereinbefore mentioned. In any action where due diligence has been exercised to locate and serve any of the persons designated in D(2)(e) above, service shall be deemed complete upon said corporation regardless of the receipt of any return receipt or advice of refusal of the addressee to receive the process mailed, as is hereinafter required by 4D(6); provided, however, that except in those actions where any of the persons designated in D(2)(e) above have been located and served personally as hereinabove provided, then service by publication shall also be made as provided hereafter in 4D(5)(d) and 4D(5)(h); the first publication must be made within sixty days from the date the original summons is mailed to the secretary of state as herein provided, and if said first publication is not so made, the action shall be deemed



dismissed as to any such party intended to be served by such publication; and service shall be complete upon the date of the last publication of summons.

When service of process is made as herein provided, and there is no appearance thereafter made by any attorney for such corporation, service of all other notices required by law to be served in such action may be served upon the secretary of state.

(g) Upon a city, village, town, school district, county, or public agency or board of any such public bodies, by delivering a copy of the summons and complaint to any commissioner, trustee, board member, mayor or head of the legislative department thereof.

(h) Upon the state, or any state board or state agency, by delivering a copy of the summons and complaint to the governor, or to any member of such state board or state agency, and also by delivering an additional copy of the summons and complaint to the attorney general.

(i) Upon an estate by delivering a copy of the summons and complaint to the personal representative thereof; upon a trust by delivering a copy of the summons and complaint to any trustee thereof.

(3) Personal Service Outside the State. Where service upon any person cannot, with due diligence, be made personally within this state, service of summons and complaint may be made by service outside this state in the manner provided for service within this state, with the same force and effect as though service had been made within this state. Where service by publication is permitted as hereinafter provided, personal service of a summons and complaint upon the defendant out of the state shall be equivalent to and shall dispense with the procedures and the publication and mailing provided for hereafter in 4(5)(c), 4(5)(d) and 4(5)(e) of this rule.

(4) Other Service. All process in any form of action shall be served in the manner specified in this rule with the exception that whenever a statute of this state or an order of the court or a citation by the court made pursuant thereto provides for the service of a notice or of an order or of a citation in lieu of summons upon any person, service shall be made under the circumstances and in the manner prescribed by the statute or order or citation; and with the further exception that all persons are required to comply with the provisions hereafter prescribed in D(5)(h), and with the provisions of sections 40-2819, 40-3405, 40-3406, 40-3423, 40-3424, 93-6228, 93-6229, 93-6230, and 93-6232, R. C. M. 1947, when the action pertains to the provisions of such sections.

(5) Service by Publication — When Permitted — Effect — Manner — Proof.

(a) When Permitted. A defendant, whether known or unknown, who has not been served under the foregoing subsections of this rule can be served by publication in the following situations only:

(i) When the subject of the action is real or personal property in this state and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partially in excluding the defendant from any interest therein.

This subsection shall apply whether any such defendant is known or unknown.

(ii) When the action is to foreclose, redeem from or satisfy a mortgage, claim or lien upon real or personal property within this state.

(iii) When the action is for divorce or for annulment of marriage of a resident of this state or for modification of a decree of divorce granted by a court of this state.

(iv) When the defendant has property within this state which has been attached or has a debtor within this state, who has been garnished. Jurisdiction under this subsection may be independent of or supplementary to jurisdiction acquired under subsections (5)(a)(i), (5)(a)(ii), and (5)(a)(iii) herein.

(b) Effect of Service by Publication. When a defendant, whether known or unknown, has been served by publication as provided in this rule, any court of this state having jurisdiction may render a decree which will adjudicate any interest of such defendant in the status, property, or thing acted upon, but it may not bind the defendant personally to the personal jurisdiction of the court unless some ground for the exercise of personal jurisdiction exists.

(c) Filing of Pleading and Affidavit for Service by Publication; and Order for Publication. Before service of the summons by publication is authorized in any case, there shall be filed with the clerk in the district court of the county in which the action is commenced (i) a pleading setting forth a claim in favor of the plaintiff and against the defendant in one of the situations defined in (5)(a) above; and (ii) in situations defined in (5)(a)(i), (5)(a)(ii), (5)(a)(iii), upon return of the summons showing the failure to find any defendant designated in the complaint, an affidavit stating that such defendant resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of summons; or, if the defendant is a domestic or foreign corporation, that none of the persons designated in D(2)(e) above can, after due diligence, be found within the state; or, if the defendant is an unknown claimant, by showing that he has made diligent search and inquiry for all persons who claim, or might claim any right, title, estate, or interest in, or lien, or encumbrance upon, such property, or any thereof, adverse to plaintiff's ownership, or any cloud upon plaintiff's title thereto, whether such claim or possible claim be present or contingent, including any right of dower, inchoate or accrued, and that he has specifically named as defendants in such action all such persons whose names can be ascertained; such affidavit shall be sufficient evidence of the diligence of any inquiry made by the affiant, if the affidavit recite the fact that diligent inquiry was made, and it need not detail the facts constituting such inquiry, and if desired, it may be combined in one instrument with the affidavit required under 4D(2)(f), or 4D(6); and (iii) in the situation defined in (5)(a)(iv) above, there must be first presented to the court proof that a valid

attachment or garnishment has been effected. Upon complying herewith, the plaintiff may obtain an order for the service of summons to be made upon the defendants by publication, which order may be issued by either the judge or the clerk of court.

(d) Number of Publications. Service of the summons by publication may be made by publishing the same three times, once each week for three successive weeks, in a newspaper published in the county in which the action is pending, if a newspaper is published in such county, and if no newspaper is published in such county then in a newspaper published in an adjoining county and having a general circulation therein.

(e) Mailing Summons and Complaint. A copy of the summons for publication and complaint, at any time after the filing of the affidavit for publication and not later than 10 days after the first publication of the summons, shall be deposited in some post office in this state, postage prepaid, and directed to the defendant at his place of residence unless the affidavit for publication states that the residence of the defendant is unknown. If the defendant is a corporation, and personal service cannot with due diligence be effected within Montana on any of the persons designated in D(2)(e) above, then service may be completed on said corporation by service upon the secretary of state in the manner, and following the procedure outlined in D(2)(f) above.

(f) Time When First Publication or Service Outside State Must Be Made. The first publication of summons, or personal service of the summons and complaint upon the defendant out of the state, must be made within 60 days after the filing of the affidavit for publication. If not so made, the action shall be deemed dismissed as to any party intended to be served by such publication.

(g) When Service by Publication or Outside State Complete. Service by publication is complete on the date of the last publication of the summons, or in case of personal service of the summons and complaint upon the defendant out of the state, on the date of such service.

(h) Additional Information to Be Published. In addition to the form of summons prescribed above in "C. Process, (2) Summons—Form," the published summons shall state in general terms the nature of the action, and in all cases where publication of summons is made in an action in which the title to, or any interest in or lien upon real property is involved, or affected, or brought into question, the publication shall also contain a description of the real property involved, affected or brought into question thereby, and a statement of the object of the action.

(6) (a) Service on Secretary of State. Whenever service is to be made upon certain corporations as provided hereinabove in D(2)(f) and D(5)(e), the requirements of said D(2)(f) must be complied with. In all other cases, unless otherwise provided by statute, whenever the secretary of state of the state of Montana has been appointed, or is deemed by law to have been appointed, as the agent



to receive service of process for any person who cannot with due diligence be found or served personally within Montana, the party, or his attorney, shall make an affidavit stating the facts showing that the secretary of state is such agent, and stating the residence and last known post-office address of the person to be served, and shall file such affidavit with the clerk of court in which such claim for relief is pending, accompanied by sufficient copies of the affidavit, summons and complaint for service upon the secretary of state, and there has also been deposited with the clerk of the court in which such claim for relief is pending the sum of five dollars to be paid to the secretary of state as a fee for each of said defendants for whom the secretary of state is to receive such service; then the clerk shall forward the original summons, one copy of the summons and one copy of the affidavit for the files of the secretary of state, and one copy of the summons attached to copy of the complaint for each of the defendants to be served by service upon the secretary of state, and the fee, to the office of the secretary of state.

Such service on the secretary of state shall be sufficient personal service upon the person to be served, provided that notice of such service and a copy of the summons and complaint are forthwith sent by registered or certified mail by the secretary of state or his deputy to the party to be served at his last known address, marked "Deliver to Addressee Only" and "Return Receipt Requested," and provided further that such return receipt shall be received by the secretary of state purporting to have been signed by said addressee, or the secretary of state shall be advised by the postal authority that delivery of said registered or certified mail was refused by said addressee, except in those cases where compliance is excused under the provisions of D(2)(f) above. The date upon which the secretary of state receives said return receipt, or receives advice by the postal authority that delivery of said registered or certified mail was refused by the addressee, shall be deemed the date of service.

As an alternative to sending the summons and complaint by registered or certified mail, as herein provided, the secretary of state, or his deputy, may cause copy of the summons and complaint to be served by any qualified law enforcement officer, in accord with the procedure set out in D(1), (2) or (3) of this rule.

The secretary of state, or his deputy, shall make an original and two copies of an affidavit reciting: (1) the fact of service upon him by the clerk of court, including the day, and hour of such service; (2) the fact of his mailing a copy of the summons and complaint and notice to the defendant, including the day and hour thereof, except in those cases where he is relieved from doing so under the provisions of D(2)(f) in which cases his affidavit shall so recite; and (3) the fact of his receipt of a return from the postal department including the date, and hour thereof, and attaching to his affidavit a copy of such return. The secretary of state, or his deputy, shall then transmit the original summons, and his original affidavit along with copy of his notice to the defendant where such notice was required,

to the clerk of court in which the claim for relief is pending, and it shall be filed in the claim for relief by said clerk of court; and the secretary of state shall also transmit to the attorney for the plaintiff copy of the affidavit of the secretary of state along with copy of the notice to the defendant where such notice was required. The secretary of state shall keep on file in his office a copy of the summons, a copy of the affidavit served on him by the clerk of court, and a copy of the affidavit executed and issued by the secretary of state.

(b) [Continuance to Allow Defense.] In any of the cases provided for in Rule 4D(2)(f) above, or provided for hereinabove in 4D(6)(a), the court in which the claim for relief is pending may order such continuance as may be necessary to afford reasonable opportunity to defend the action.

(7) Amendment. At any time, in its discretion, and upon such notice and terms as it deems just, the court may allow any process or proof of service thereof to be amended unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

(8) Proof of Service. Proof of the service of the summons and of the complaint or notice, if any, accompanying the same must be as follows:

(a) If served by the sheriff or other officer, his certificate thereof;

(b) If by any other person, his affidavit thereof;

(c) In case of publication an affidavit of the publisher and an affidavit of the deposit of a copy of the summons and complaint in the post office as required by law, if the same shall have been deposited; or

(d) The written admission of the defendant showing the date and place of **service**.

The certificate or affidavit of service mentioned in this subdivision must state the time, date, place, and manner of service.

(9) Contents of Affidavit of Service. Whenever a process, pleading, order of court, or other paper is served personally by a person other than the sheriff or person designated by law, the affidavit of service when made, shall state that the person so serving is of legal age, and the date and place of making the service. It also shall state that the person making such service knew the person served to be the person named in the papers served and the person intended to be served.

(10) Procedure Where Only Part of Defendants Are Served. If the summons is served on one or more, but not all, of the defendants, the plaintiff may proceed to trial and judgment against the defendant or defendants on whom the process is served, and may at any time thereafter have a summons against the defendant not served with the first process to cause him to appear in said court to show cause why he should not be made a party to such judgment. Upon such defendant being duly served with such process, the court shall hear and determine the matter in the same manner as if such defendant had been originally brought into court, and such defendant shall also be allowed the benefit of any



payment or satisfaction which may have been made on the judgment before recovered.

**History:** En. Sec. 4, Ch. 13, L. 1961; amd. Sec. 1, Ch. 189, L. 1963; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965; amd. Sup. Ct. Ord. 10750, Sept. 7, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750, Nov. 28, 1966, eff. Jan. 1, 1967; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968; amd. Sup. Ct. Ord. 10750-10, Oct. 22, 1971, eff. Jan. 1, 1972; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

#### Amendments

The 1965 amendment rewrote paragraphs (e) and (f) of subdivision (2), for previous text of which see parent volume; substituted "if the defendant is a domestic or foreign corporation, that none of the persons designated in D(2)(e) above can" for "that the defendant, if a domestic or foreign corporation, has no agent for the service of process, nor managing nor business agent, cashier, secretary, or other officer who can" in clause (ii) of paragraph (5)(c); inserted "and if desired, it may be combined in one instrument with the affidavit required under 4 D(2)(f), or 4 D(6)" at the end of clause (ii) of paragraph (5)(c); substituted the second sentence of paragraph (5)(e) for two sentences applying only to foreign corporations, for text of which see parent volume; substituted "any party intended to be served by such publication" for "any person not served within said 60-day period" at the end of paragraph (5)(f); completely rewrote subdivision (6), for previous text of which see parent volume; inserted "by" in clause (8)(b); and made minor style changes in paragraphs (3), (4), and (5)(a)(iv).

The amendment of September 7, 1965, in subdivision (2), deleted "or attorney" in clause (i) of paragraph (e) and, in paragraph (f), substituted "court of this state" for "court in this state" in the first clause of the first sentence, substituted "subject to the jurisdiction \* \* \* Rule 4B above" for "actually doing business within Montana or was actually doing business in Montana at the time the claim for relief arose," in the second clause of the first sentence, and substituted "persons" for "person" in the fourth sentence.

The amendment of November 28, 1966 added paragraph (i) of subdivision (2); in the second sentence of subdivision (3), deleted "of summons" after "Where service," deleted "made after the filing of the required complaint and required affidavit for publication" after "out of the state," inserted the reference to 4(5)(c), and made other changes in phraseology; and, in clause (8)(d), substituted "date" for "time."

The amendment of September 29, 1967, in subdivision (4), inserted "with the provisions hereafter prescribed in D(5)(h), and" and "93-6228."

The 1971 amendment inserted in subdivision (2) (e) (ii) the provision for service on the registered agent named in the records of the secretary of state.

The 1975 amendment lowered the age in subdivision (1) from 21 to 18.

#### Commission Note to 1965 Amendment

Because of criticism from several members of the Bar, as well as the office of the Secretary of State, changes have been made in the provisions of Rule 4. In addition, some housekeeping changes have also been made.

We have inserted at the points where changes or additions have been made the new language italicized [not italicized herein; see Amendment note above].

Several members of the Bar have called the attention of the Rules Committee to the fact that particularly in quiet title actions, where defunct corporations were involved, and where none of the persons could be found with due diligence upon whom service could be completed that would be binding on the defunct corporation, that effective service could not be obtained by reason of the requirement of a return of a registered receipt showing delivery of the summons and complaint to the defunct corporation. We have now corrected that defect. In doing so, we have also brought within the framework of Rule 4 the provisions of R. C. M. 1947, Sections 93-3008, 93-3011, and 93-3012, which will be superseded. In addition, as long as we are changing Rule 4, we have now specified and delineated the same persons to be served whether or not the defendants are domestic or foreign corporations, or domestic or foreign partnerships or other unincorporated associations. It will be recalled that when Rule 4 was first promulgated, and in an effort not to bring about any changes in our prior practice, the old, separate, segregated statutes pertaining to domestic and foreign corporations were segregated in Rule 4. There is no reason, however, why the same persons should not be delineated for both domestic and foreign corporations, and we have now done so in this new writing of Rule 4.

In lieu of the requirement of a return receipt signed on behalf of the corporations, which in many instances cannot be accomplished, as pointed out in the criticism from the Bar, we have now added a requirement for publication of summons against such corporation where none of the persons can be found with due diligence upon whom personal service can be



completed. (See the new D(2)(f). In so providing, however, we have now spelled out that the same procedure for publications shall be followed for serving corporations personally in in personam actions, as we have provided for serving such corporations by publication in in rem actions (see D(5)(e)).

Accordingly, we have made an effort to combine and streamline service on corporations by designating the same individual persons who can be served, whether the corporations are domestic or foreign, and providing the same procedure of publication where such persons cannot be found with due diligence, whether or not the defendants are domestic and foreign, and we have eliminated the necessity of the return of a signed registry receipt objected to so heavily by the Bar.

A second important change in the rule is specific authorization for an attorney for the plaintiff to incorporate within the framework of one single affidavit all the material necessary for serving defunct corporations personally, for serving by way of publication, and for serving the secretary of state.

Changes have also been made in those portions of the rule providing for service on the secretary of state. We have eliminated the necessity of the intermediate step of having summons and complaint go through the hands of the sheriff in Lewis and Clark County; we have cut down on the papers that must be kept on file by the secretary of state, particularly eliminating the necessity of his keeping a copy of the complaint; and we have provided a requirement that the secretary of state shall now serve upon the attorney for the plaintiff the factual information showing what was done by the secretary of state in effecting service, and the date when it was accomplished.

There are other minor housekeeping changes in the rule, and wherever there is any change, omission, alteration, or new language, reference to it is contained at the points where such is accomplished.

#### **Commission Note to September 7, 1965 Amendment**

The amendments to Rule 4D(2) as to (e) is to remove an "attorney" because of doubt as to who would be such within the meaning of the Rule. As to (f) to avoid possible conflict of the provisions of this subdivision and those of 4B.

The other amendments [Rules 50(b), 52(b), 59(e) and 60(c)] will expedite the hearing and determination of the motions involved, and provide a time after submission within which the motions are deemed denied if the court fails to decide them.

#### **Advisory Committee's Note to November 28, 1966 Amendment**

Rule 4D(2)(i): The purpose of the amendment is to remove doubts as to the manner of suing an estate and a trust, resultant from the inclusion of "an estate" and "a trust" in the definition of a person in 4A.

Rule 4D(3): To make it clear that the personal service outside this state dispenses with the necessity for following the procedure for service by publication prescribed by 4D(5). The provision for service of "a summons and complaint" permits personal service of either the original summons or the summons for publication, together with the complaint. As provided in 4D(5)(g), in case of personal service outside of this state service is complete on the date of such service.

Rule 4D(8)(d): To make it clear that it is the date and not the hour of day which should be shown in the admission of service. The time requirement in certificates or affidavits of personal service is considered desirable and no change in the last paragraph of 4D(8) is recommended.

#### **Advisory Committee's Note to September 29, 1967 Amendment**

Source: None.

See Committee's Note to 42C(2).

#### **Advisory Committee's Comment on December 31, 1975 Amendment**

This change brings the rule into line with the recent legislative changes. Except as amended Rule 4 would remain the same.

#### **Retroactive Application**

Rule 4B(1), applied to act of alleged malpractice occurring in Montana prior to the effective date of this rule (Rule 86(a)) and doctor who had not resided in Montana since effective date of rule could properly be served with process in California under this rule. *State ex rel. Johnson v. District Court of Fourth Judicial District*, 148 M 22, 417 P 2d 109, 111.

### **DECISIONS UNDER FORMER LAW**

#### **Paragraph (2)**

The doctrine of ostensible agency under section 2-205 has no application in determining whether service of process has

been legally made on a "managing or general agent" within the meaning of this rule. *Kraus v. Treasure Belt Min. Co.*, 146 M 432, 408 P 2d 151.

**Paragraph (5)**

Jurisdiction of the court attaches at the time of personal service of the complaint and summons, so that a prematurely entered default judgment is voidable and not void. *Sowerwine v. Sowerwine*, 145 M 81, 399 P 2d 233.

**Paragraph (8)**

Appearance and waiver executed by a foreign corporation, not qualified to do business in Montana, acknowledging receipt of amended complaint filed by plaintiff sufficiently complied with former section 93-3018. *Greene Plumbing & Heating Co. v. Morris*, 144 M 234, 395 P 2d 252, 255.

**Rule 5. Service and filing of pleadings and other papers.**

(a) **SERVICE: WHEN REQUIRED.** Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the Court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the Court otherwise orders, every written motion other than one which may be heard *ex parte*, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

**History:** En. Sec. 5, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

**Amendments**

The amendment of September 29, 1967 inserted "Except as otherwise provided in these rules" at the beginning of the first sentence; deleted "affected thereby, but" at the end of the first sentence, making the remainder of the original sentence into the second sentence.

The 1975 amendment inserted "every paper relating to discovery required to be served upon a party unless the Court otherwise orders" in the first sentence.

**Advisory Committee's Note to September 29, 1967 Amendment**

Source: Fed. R. Civ. P. 5(a), as amended 1963.

Explanation of change: The words "affected thereby" stricken out by the

amendment, introduced a problem of interpretation. The amendment eliminates this difficulty and promotes full exchange of information among the parties by requiring service of papers on all the parties to the action, except as otherwise provided in the rules.

**Advisory Committee's Comment on December 31, 1975 Amendment**

The foregoing Amendment will bring this sub-section into line with Rule 5(a) FRCP.

**Notice of Entry of Judgment Omitted**

The date of service of notice of entry of judgment is the arbitrary point in time from which the time limits for appeal begin to run. If no notice of entry of judgment has been served upon the losing party, the right to appeal has not expired. *Haywood v. Sedillo*, — M —, 535 P 2d 1014.

**Rule 6. Time.****(a) COMPUTATION.****Statute of Limitations**

Complaint filed three years and one day after act in suit governed by three-year statute of limitations was timely where

last day of three-year period was Sunday. *Grey v. Silver Bow County*, 149 M 213, 425 P 2d 819.

(b) **ENLARGEMENT.** When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period en-

larged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d), (e) and (f), and 60(b), except to the extent and under the conditions stated in them.

**History:** En. Sec. 6, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

#### Amendments

The amendment of May 21, 1969 inserted the reference to Rule 50(f).

**Advisory Committee's Note to May 21, 1969 Amendment**

Explanation of change: Reference to "59(f)" is added to conform with amendments to Rule 59.

### III. PLEADINGS AND MOTIONS

**Rule 8. General rules of pleading.**

12. Defenses and objections—When and how presented—By pleading or motion —Motion for judgment on pleadings.
13. Counterclaim and cross-claim.
15. Amended and supplemental pleadings.

**Rule 7. Pleadings allowed—Form of motions.**

#### (a) PLEADINGS.

##### Reply

A plaintiff is not required to reply to an answer where not specifically ordered to do so by the court, nor is it mandatory to reply to an affirmative defense of a release, since under Rule 8(d), where no responsive pleading is required, the aver-

ment is deemed denied. *Wheat v. Safeway Stores, Inc.*, 146 M 105, 404 P 2d 317.

##### References

*Rambur v. Diehl Lumber Co.*, 143 M 432, 391 P 2d 1.

#### (b) MOTIONS AND OTHER PAPERS.

##### New Trial Motion

It was error to grant a new trial based on a motion that did not state the grounds

with particularity but rather stated the grounds in the words of section 93-5603. *Halsey v. Uithof*, — M —, 532 P 2d 686.

#### (c) DEMURRERS, PLEAS, ETC., ABOLISHED.

##### References

*Payne v. Mountain States Telephone and Telegraph Co.*, 142 M 406, 385 P 2d 100.

**Rule 8. General rules of pleading.**

#### (a) CLAIMS FOR RELIEF.

##### Amended Complaint

"Amended complaint" filed under original cause number, was a valid, initial complaint where it satisfied requirements of notice despite fact that previous complaint had been withdrawn and dismissed without prejudice. *Butte Country Club v. Metropolitan San. & S. S. D. No. 1*, — M —, 519 P 2d 408.

##### Failure to Plead Claim

Where plaintiff failed to plead claim for deficiency judgment on balance remaining

after sale of repossessed vehicles, no deficiency judgment could be rendered and the pleadings could not be amended to conform even though evidence had been received which might have supported such a judgment. *Gallatin Trust & Savings Bank v. Darrah*, 152 M 256, 448 P 2d 734.

##### Insufficient Complaint

Complaint for libel alleging that defendant while acting within the course and scope of his employment caused employer to terminate plaintiff's contract, was a



contradiction, and was insufficient to allege libel or interference with contract. *Baillie v. Rollins*, — M —, 530 P 2d 440.

#### Notice Pleading

Where pleading titled "Amended Complaint" which satisfied notice and other requirements of statute was filed, it was valid initial complaint under modern rules of notice pleading. *Butte Country Club v. Metropolitan Sanitary and Storm Sewer District No. 1*, — M —, 519 P 2d 408.

#### Separate Claims on Note and Mortgage

Upon default in an action against the unconditional guarantors of a note and to foreclose mortgage securing the note, the holder of the note may properly proceed

at its option against either security in the same action. *Bozeman Deaconess Foundation v. Cowgill*, 143 M 98, 387 P 2d 435.

#### Statute of Limitations

Although the statute of limitations need not be negated in the complaint, the court should consider whether a motion to amend a complaint relates back to the original complaint and so avoids the bar of the statute of limitations. *Prentice Lumber Co. v. Hukill*, 161 M 8, 504 P 2d 277.

#### References

*Hidden Hollow Ranch v. Collins*, 146 M 321, 406 P 2d 365; *Williams v. Superior Homes, Inc.*, 148 M 38, 417 P 2d 92, 93.

(b) **DEFENSES—FORM OF DENIALS.** A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11.

**History:** En. Sec. 8, Ch. 13, L. 1961; amd. Ord. Sup. Ct. June 1, 1964, eff. July 1, 1964.

#### Amendment

The 1964 amendment substituted "or" for "of" after "only a part" in the fourth sentence.

(c) **AFFIRMATIVE DEFENSES.** In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

**History:** En. Sec. 8, Ch. 13, L. 1961; amd. Ord. Sup. Ct. June 1, 1964, eff. July 1, 1964.

#### Amendment

The 1964 amendment substituted "affirmative" for "affirmative" after "shall set forth" in the first sentence.

#### Insurance Policy Exclusions

Insurer need not affirmatively plead exceptions and exclusions from coverage contained in policy where entire policy and insurer's denial of coverage were incorporated in insured's pleadings. *Home Ins. Co. v. Pinske Bros., Inc.*, 156 M 246, 479 P 2d 274.

**Laches**

Defendant who failed to plead laches as an affirmative defense in his answer waived such defense and could not raise the issue in a post-trial motion to dismiss. *Hansen v. Kiernan*, 159 M 448, 499 P 2d 787.

**Partial Payment**

Partial payment by special deposit was an affirmative defense which debtor had burden of proving in suit on note; that burden of proof required that it be shown that payment was made on the particular obligation in controversy. *Baker Nat. Bank v. Lestar*, 153 M 45, 453 P 2d 774.

**Pleadings**

Defendant was not entitled to raise statute of limitations by motion to dismiss since statute of limitations defense is to be pleaded affirmatively. *Butte Country Club v. Metropolitan San. & S. S. D. No. 1*, — M —, 519 P 2d 408.

**Res Judicata**

Where supreme court affirmed dismissal of complaint by trial court on ground that complaint was unverified as required by section 93-3702 and on additional ground that complaint failed to state a claim upon which relief could be granted and a week later plaintiff filed a second verified amended complaint which eliminated confusion, the issue of res judicata was not so clear that the supreme court on the second appeal could say that the trial court could have found

the defense of res judicata available without an answer under Rule 8(c) or responsive pleading to present the record of the former judgment plus a statement to show why it should be treated as res judicata. *Rambur v. Diehl Lumber Co.*, 144 M 84, 394 P 2d 745, 748.

**Statute of Limitations**

Where plaintiff filed complaint alleging injury to real property more than two years after injury occurred, defendants waived defense of statute of limitations when they failed to plead it affirmatively. *Butte Country Club v. Metropolitan Sanitary and Storm Sewer District No. 1*, — M —, 519 P 2d 408.

**Unavoidable Accident**

Unavoidable accident is not among defenses that must be pleaded affirmatively and is covered under general denial of negligence. *Graham v. Rolandson*, 150 M 270, 435 P 2d 263.

**Waiver Refuted by Evidence**

Defense of waiver of breach of warranty was refuted by evidence that the plaintiff, although retaining defective computer for nearly eight months, made numerous complaints resulting in almost daily service calls and shut-downs for repairs. *Lovely v. Burroughs Corp.*, — M —, 527 P 2d 557.

**References**

*Interstate Mfg. Co. v. Interstate Products Co.*, 146 M 449, 408 P 2d 478.

**(d) EFFECT OF FAILURE TO DENY.****Answer**

No further proof of heirship was required and summary judgment was proper where portion of paragraph in complaint alleging heirship was admitted in answer. *Sikora v. Sikora*, 160 M 27, 499 P 2d 808.

**Reply**

The stipulation in this rule that averments in answer to which no responsive pleading is required are denied, read in conjunction with Rule 7(a), does not compel the plaintiff to reply to an answer averring the affirmative defense of a release. *Wheat v. Safeway Stores, Inc.*, 146 M 105, 404 P 2d 317.

**(e) PLEADING TO BE CONCISE AND DIRECT—CONSISTENCY.****Form of Pleading**

No particular form of pleading is necessary to seek partition of property in a divorce proceeding, and where plaintiff prayed that the court settle and adjust the property rights of the parties, includ-

ing partition or sale of the property if necessary, and both sides briefed and argued the issue, there was sufficient notice to defendant and partition was proper. *Hodgson v. Hodgson*, 156 M 469, 482 P 2d 140.

**Rule 9. Pleading special matters.****(b) FRAUD, MISTAKE, CONDITION OF THE MIND.****References**

*Brooks v. Brooks Pontiac, Inc.*, 143 M 256, 389 P 2d 185.

**(c) CONDITIONS PRECEDENT.****General Denial**

In action by materialman against general contractor for material supplied subcontractor, contractor could not make affirmative defense that statutory notice was not given under materialmen's statute after materialman alleged that he had complied with all conditions precedent to bringing suit and contractor entered general denial; general denial of allegation

that all conditions precedent were performed did not put matter in issue and would be treated as admission that they were performed. *Treasure State Industries, Inc. v. Leigland*, 151 M 288, 443 P 2d 22.

**References**

*Interstate Mfg. Co. v. Interstate Products Co.*, 146 M 449, 408 P 2d 478.

**Rule 11. Signing of pleadings.****Lack of Verification**

Where a complaint was prepared to conform to this rule but lacked verification, and defendant waited until after he received an adverse judgment to raise the

issue in a motion to dismiss on appeal, such motion failed as his proper remedy would have been a motion to strike under Rule 12. *Adams v. Davis*, 142 M 587, 386 P 2d 574.

**Rule 12. Defenses and objections—When and how presented—By pleading or motion—Motion for judgment on pleadings.**

**(a) WHEN PRESENTED.****Pleading after Denial of Motion**

Defendants had twenty days from day on which motion to dismiss complaint

was denied in which to serve and file responsive pleading. *Sealey v. Majerus*, 149 M 268, 425 P 2d 70.

**DECISIONS UNDER FORMER LAW****Default Taken Prematurely**

Husband who went to Canada and was personally served there in divorce action had forty days in which to answer under the combined time allotted in former Rules 4(D)(5)(g) and 12(a), M. R. Civ. P., and default taken before that time was voidable. *Sowerwine v. Sowerwine*, 145 M 81, 399 P 2d 233.

**Jurisdiction**

Jurisdiction of the court attaches at the time of personal service of the complaint and summons, so that a prematurely entered default judgment is voidable and not void. *Sowerwine v. Sowerwine*, 145 M 81, 399 P 2d 233.

**(b) HOW PRESENTED.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to the claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary



judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56.

(i) The cases in which place of trial may be changed are specified in section 93-2906, R. C. M. 1947.

(ii) If the county designated in the complaint is not the proper county for trial of the action, the defendant must at the time of his first appearance request by motion that the trial be had in the proper county. Every defense in law or fact, to a claim for relief in any pleading which defendant desires to present by way of motion as hereinabove provided must be joined with, or inserted in, the motion requesting a change in the place of trial. If the court in which the action is commenced grants the request for change of venue, that court shall not consider nor pass upon other defenses in law, or fact, presented by the motion, but such shall be considered and decided by the court sitting in the proper county after the transfer has been completed. No request for change of venue is waived by being joined in a motion with other defenses or objections in law or fact.

(iii) Any request for change in place of trial for grounds 2 and 3 of section 93-2906, R. C. M. 1947, must be presented by motion within 20 days after the answer to the complaint, or to the cross-claim where a cross-claim is filed, or the reply to any answer, in those cases in which a reply is authorized, has been filed; except that whenever at some time more than twenty days after the last pleading has been filed an event occurs which thereafter affords good cause to believe that an impartial trial cannot be had under ground 2 of said section 93-2906, and competent proof is submitted to the court that such cause of impartiality did not exist within the twenty-day period after the last pleading was filed, then the court may entertain a motion to change the place of trial under ground 2 of section 93-2906 within twenty days after that later event occurs.

(iv) With respect to ground 4 of section 93-2906, R. C. M. 1947, the party who disqualifies a district judge, and who desires a change of venue, must include such request in a motion filed along with the affidavit of disqualification. If the party who does not disqualify the district judge desires a change of venue, he shall make such request by motion within 5 days after being served with a copy of the affidavit of disqualification. Unless the parties have agreed in writing upon another district judge, or upon a member of the bar as judge pro tempore, the disqualified district judge must either call in another district judge within fifteen days after filing of the affidavit of disqualification, or ten days after filing of the motion for change of venue, or, if no other judge is called in, grant the motion for change of venue. If any other qualified district judge shall be called in, as herein provided, and shall, within thirty days after the motion for change of venue has been filed, appear and assume jurisdiction of the cause and of all matters and proceedings therein, no change of the place of trial shall be made. If the other qualified district judge called in, as herein provided, fails to appear and assume jurisdiction within thirty days after the motion for change of venue has been filed, then the disqualified judge must immediately grant the motion and order a change in the place of trial to some other county.

**History:** En. Sec. 12, Ch. 13, L. 1961; amd. Sec. 1, Ch. 89, L. 1963; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### Amendments

The 1965 amendment renumbered some of the numbered clauses in the first sentence and added subdivisions (i) to (iv). See Commission Note below.

The amendment of September 29, 1967, in the introductory paragraph, substituted "a party under Rule 19" for "an indispensable party" in item (7); and, in the fourth sentence, substituted "the" for "that" before "claim for relief."

#### Commission Note to 1965 Amendment

The numbering of the defenses which may be made by motion is changed to conform to that of the Federal Rule, which results in there being no "(3)" because "improper venue" as a ground for motion to dismiss was deleted in 1963. Subdivisions (i), (ii), (iii), and (iv) are added to clarify and detail the time and manner for motions for change of place of trial in the cases specified in Section 93-2906, R. C. M. 1947.

#### Advisory Committee's Note to September 29, 1967 Amendment

Source: Fed. R. Civ. P. 12(b), as amended 1966.

Explanation of change: The terminology is changed to accord with the amendment of Rule 19. The numbering of listed defenses of the Montana Rule is retained: "(3) improper venue" is omitted; and the provisions of subdivisions (i), (ii), (iii) and (iv), dealing with motions for change of place of trial, remain unchanged.

#### Appeal from Order Sustaining Motion

An order sustaining a motion to dismiss is not appealable. *Rambur v. Diehl Lumber Co.*, 143 M 432, 391 P 2d 1, but see *Prentice Lumber Co. v. Hukill and Hasbrook v. Krsul*, below.

Dismissal of complaint pursuant to this rule is appealable since the practical effect of dismissal is to leave plaintiff without opportunity for further judgment relief, just as if judgment had been entered against him. *Prentice Lumber Co., Inc. v. Hukill*, 161 M 8, 504 P 2d 277; *Hasbrook v. Krsul*, — M —, 541 P 2d 1197.

#### Failure to State a Claim

Where contract for sale of real property contained statements that time was of the essence and that payments could be made on or before January 15 of each year, action for breach of contract by vendor against vendee for making accelerated payments was improperly dis-

missed for failure to state a claim, since the words of the contract were ambiguous and it did not appear as a certainty that plaintiff was entitled to no relief. *Kielmann v. Morgan*, 156 M 230, 478 P 2d 275.

Complaint against county sheriff and four deputies and county attorneys and two deputies for damages arising out of plaintiff's arrest, search of plaintiff's store, and plaintiff's public trial did not state claim upon which relief could be granted since public officers are immune from civil liability for their official acts and complaint did not allege defendants were acting outside their capacity as public officers or in excess of their authority. *Wheeler v. Moe*, — M —, 515 P 2d 679.

Courts view motions to dismiss for failure to state a claim upon which relief can be granted with disfavor, and will grant them only where the complaint and accompanying allegations show upon their face some insuperable barrier to relief. *Wheeler v. Moe*, 163 M 154, 515 P 2d 679; *Buttrell v. McBride Land & Livestock*, — M —, 553 P 2d 407.

#### Hearing on Lack of Jurisdiction

Dismissal of tort action for lack of jurisdiction was premature without full hearing and cross-examination on defendant's motion under Rule 12(b)(2), where complaint alleged that corporate defendant had agent in Montana but answer of nonresident corporation stated that corporation had no "representative resident" in Montana, but also stated that "orders received from dealers in Montana are accepted in Indiana." *Harrington v. Holiday Rambler Corp.*, — M —, 525 P 2d 556.

#### Involuntary Dismissal

Rule 41(b), providing for involuntary dismissal which operates as an adjudication upon the merits, has no application to a motion to dismiss for failure to state a claim under this rule. *Rambur v. Diehl Lumber Co.*, 144 M 84, 394 P 2d 745, 750.

#### Motion to Dismiss

A motion to dismiss under this rule is equivalent to a demurrer under former procedure. *Payne v. Mountain States Telephone and Telegraph Co.*, 142 M 406, 385 P 2d 100; *Holtz v. Babcock*, 143 M 341, 389 P 2d 869, 390 P 2d 801; *Rambur v. Diehl Lumber Co.*, 143 M 432, 391 P 2d 1; *Duffy v. Butte Teachers Union No. 332*, — M —, 541 P 2d 1199.

While a motion to dismiss for failure to state a claim on which relief can be granted is the same as a demurrer under former Montana procedure and therefore admits to all facts well pleaded, it does

not admit to controversial conclusions of law or to the accuracy of alleged construction of written instruments set forth in the pleading. *Holtz v. Babcock*, 143 M 341, 389 P 2d 869, 390 P 2d 801.

A motion to dismiss was proper under this rule where return was made more than three years after commencement of action in violation of Rule 41(e), and lack of jurisdiction did not have to be pleaded as an affirmative defense. *Whitcraft v. Semenza*, 145 M 94, 399 P 2d 757.

### Res Judicata

Where supreme court affirmed lower court judgment dismissing complaint for failure to state a claim upon which relief could be granted under this rule, the judgment was not res judicata as to a second amended complaint under the provisions of Rule 56(c) treating motion as a summary judgment where matters outside the pleadings were presented to and not excluded by the court. *Rambur v. Diehl Lumber Co.*, 144 M 84, 394 P 2d 745, 749.

## (c) MOTION FOR JUDGMENT ON THE PLEADINGS.

### References

*Steffes v. Crawford*, 143 M 43, 386 P 2d 842.

(d) PRELIMINARY HEARINGS. The defenses specifically enumerated (1) [to] (7) in subdivision (b) of this rule whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until trial.

**History:** En. Sec. 12, Ch. 13, L. 1961; amd. Sec. 1, Ch. 89, L. 1963; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

substituted "(7)" for "(6)" and deleted "the" before "trial" at the end of the section.

### Compiler's Notes

The compiler inserted the bracketed "to" near the beginning of this subdivision.

### Amendments

The amendment of September 29, 1967

### Advisory Committee's Note to September 29, 1967 Amendment

Explanation of change: "(7)" has been substituted for "(6)" to correct misnumbering and conform to the defenses enumerated in subdivision (b) [Rule 12(b)].

(g) CONSOLIDATION OF DEFENSES IN MOTION. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

**History:** En. Sec. 12, Ch. 13, L. 1961; amd. Sec. 1, Ch. 89, L. 1963; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

objections"; inserted "a motion" after "except"; and substituted "subdivision (h)(2) \* \* \* there stated" for "subdivision (h) of this rule."

### Amendments

The amendment of September 29, 1967, in the first sentence, substituted "any" for "the" before "other motions"; in the second sentence, substituted "but omits therefrom any defense or objection" for "and does not include therein all defenses and objections" and "on the defense or objection" for "on any of the defenses or

### Advisory Committee's Note to September 29, 1967 Amendment

Source: Fed. R. Civ. P. 12(g) and (h), as amended 1966.

Explanation of change: Where a dilatory defense is omitted from a preanswer motion, under the language of these subdivisions [Rule 12(g) and 12(h)] the cases are divided on the question of whether



the defense can be included in the answer although it is not permitted in another motion. This amendment prevents the inclusion of such omitted defenses in the answer as well as in another preanswer motion. This change follows the provisions of the federal amendment, except that "improper venue" is not included

in the enumeration in (h)(1)(A), because the times for making motions for a change of venue are specified in subdivisions (b)(ii), (iii) and (iv) of the Montana Rule [12(b)].

The substance of subdivision (g) has not been changed.

### (h) WAIVER OR PRESERVATION OF CERTAIN DEFENSES.

(1) A defense of lack of jurisdiction over the person, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

**History:** En. Sec. 12, Ch. 13, L. 1961; amd. Sec. 1, Ch. 89, L. 1963; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### Amendments

The amendment of September 29, 1967 rewrote this rule, dividing it into three subdivisions. For text of former rule, see parent volume.

#### Advisory Committee's Note to September 29, 1967 Amendment

Source: Fed. R. Civ. P. 12(g) and (h), as amended 1966.

Explanation of change: See Advisory Committee's Note under Rule 12(g).

#### Lack of Jurisdiction

Defendant who did not plead lack of jurisdiction over the person in his initial response to complaint was precluded from making subsequent motion on the omitted defense under subsection (g) and he thereby waived the defense under provisions of this subsection. *Prentice Lumber Co. v. Spahn*, 156 M 68, 474 P 2d 141.

### Rule 13. Counterclaim and cross-claim.

#### (g) CROSS-CLAIM AGAINST COPARTY.

##### Failure to File

Employer's insurer who paid judgment entered against employer and employee in automobile accident case did not lose its right of indemnity against employee

by employer's failure to file cross-claim in accident action. *St. Paul Fire & Marine Ins. Co. v. Thompson*, 152 M 396, 451 P 2d 98.

### DECISIONS UNDER FORMER LAW

#### Parties to Cross-claim

District court did not have jurisdiction and power to adjudicate mechanics' liens of cross-complainants, materialmen, where

they failed to serve the principal contractor with process. *Greene Plumbing & Heating Co. v. Morris*, 144 M 234, 395 P 2d 252, 256.

(h) JOINDER OF ADDITIONAL PARTIES. Persons other than those made parties to the original action may be made parties to a coun-

terclaim or cross-claim in accordance with the provisions of Rules 19 and 20.

**History:** En. Sec. 13, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### Amendments

The amendment of September 29, 1967 rewrote this rule. For text of former rule, see parent volume.

#### Advisory Committee's Note to September 29, 1967 Amendment

Source: Fed. R. Civ. P. 13(h), as amended 1966.

Explanation of change: The amendment to Rule 13(h) incorporates by direct reference the revised criteria and procedures

of Rule 19, as amended. The amendment also expressly refers to Rule 20 thus correcting an existing inadequacy by calling attention to the fact that a party pleading a counterclaim or a cross-claim may join additional persons when the conditions for permissive joinder of parties under Rule 20 are satisfied. Hereafter, for the purpose of determining who must or may be joined as additional parties to a counterclaim or cross-claim, the party pleading the claim is to be regarded as a plaintiff and the additional parties as plaintiffs or defendants as the case may be, and amended Rules 19 and 20 are to be applied in the usual fashion.

### Rule 14. Third-party practice.

#### (a) WHEN DEFENDANT MAY BRING IN THIRD PARTY.

##### "Cross-claim" against Nonparties

Rules of Civil Procedure do not permit nor even contemplate a cross-claim against a person or entity which is not a party; such a "cross-claim" cannot be converted into a third-party claim under this rule where neither allegations nor relief sought could be stretched to state that nonparties might be liable to defendant for all or part of plaintiff's claim against him. *Campanella v. Bouma*, — M —, 520 P 2d 1073.

##### Insurance Coverage

Federal court dismissed action for declaratory judgment declaring obligations of casualty insurance company under an automobile casualty insurance policy which had allegedly been canceled prior to the time of the accident involving the automobile of the insured sued for injuries resulting from the accident, since the issues which did not involve federal law, could be solved in the state court wherein third-party complaint under this

rule had been filed by the insured against the insurer in which the insured sought to hold the insurer to the terms of the policy, where the state court could dispose of the coverage problems first under *M. R. Civ. P.*, Rule 42(b). *Western Casualty & Surety Co. v. Pinson*, 255 F Supp 624, 625.

##### Separate Trial of Third Party Action

Third party claim initiated by hospital, which was being sued by minor patient burned by defective television switch while in hospital, against lessor of television equipment should have been separated from main action between hospital and patient and tried separately. *Crosby v. Billings Deaconess Hospital*, 149 M 314, 426 P 2d 217.

##### References

*Wheat v. Safeway Stores, Inc.*, 146 M 105, 404 P 2d 317.

### Rule 15. Amended and supplemental pleadings.

#### (a) AMENDMENTS.

##### Discretionary Power of Court

Where it was very clear that the supreme court, upon a former appeal of the same case, was unanimous in its decision to affirm the jury verdict and as to the ineffectiveness of additur order, the fact that the supreme court affirmed the jury verdict and thereby finally determined the amount of the award withdrew any discretion that might have been otherwise possessed by the trial judge to allow amendments to the pleadings. State acting by and through State Highway Commission v. Schmidt, 148 M 316, 420 P 2d 153, 155.

Trial court's discretionary power to grant leave to amend pleadings may be limited by a decision of the supreme court upon a former appeal of the same case. State acting by and through State Highway Commission v. Schmidt, 148 M 316, 420 P 2d 153, 155.

A proposed second amended complaint which sought to substitute an indebtedness on account of goods sold and delivered for indebtedness on a default judgment covering substantially the same account because the judgment had been set aside, and which attempted to hold the directors personally liable for the debts

of a corporation by reason of their failure to file an annual statement, was properly refused by the trial court where the evidence indicated bad faith in that the vacated default judgment was taken without the knowledge of the president or directors of the corporation and in that the course of dealings with the president of the corporation was withheld from the directors of the subject corporation. *Prentice Lumber Co. v. Hukill*, 161 M 8, 504 P 2d 277.

#### **Right to Amendment of Course**

The motion to dismiss for failure to state a claim is not a responsive pleading within the provisions of this rule that complaint may be amended once as a matter of course before a responsive pleading is served. *Rambur v. Diehl Lumber Co.*, 144 M 84, 394 P 2d 745, 748.

#### **Timeliness**

Granting plaintiff's motion to amend complaint to include theory of implied

warranty of fitness for a particular purpose was error where motion was presented shortly before trial and plaintiff had relied upon theory of negligence through the entire course of the pre-trial proceedings; warranty theory was foreign to the proper pleading of the case and required defendant to be prepared for an entirely different defense theory. *McGuire v. Nelson*, — M —, 508 P 2d 558.

In an action for an accounting of the assets of an alleged partnership, it was error for trial court to allow defendant to amend his answer on day of trial and then proceed immediately on the basis of the pleadings as amended where first answer had denied the existence of a partnership, but amended answer admitted the existence of a partnership agreement, denied failure to offer an accounting, and alleged breach of the agreement by plaintiff. *Mitchell v. Mitchell*, — M —, 545 P 2d 657.

### **(b) AMENDMENTS TO CONFORM TO THE EVIDENCE.**

#### **Jury Instructions**

Although this rule has been liberally applied in favor of allowing amendment of pleadings to conform to the evidence, where a change in the theory of liability from negligence to breach of contract caused the trial court to submit to the jury instructions based on both theories, which instructions when read as a whole were conflicting, inconsistent and confusing, trial court erred in denying motion for new trial. *Brothers v. Surplus*

*Tractor Parts Corp.*, 161 M 412, 506 P 2d 1362.

#### **Notice of Claim**

Where plaintiff failed to plead claim for deficiency judgment on balance remaining after sale of repossessed vehicles, the pleadings could not later be amended to conform to evidence that would have supported a deficiency judgment. *Gallatin Trust & Savings Bank v. Darrah*, 152 M 256, 448 P 2d 734.

**(c) RELATION BACK OF AMENDMENTS.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The requirements of clauses (1) and (2) hereof are satisfied with respect to any city, village, town, school district, county, or public agency, board or officer of such public bodies, and with respect to the state or any state board, agency or officer thereof, to be brought into the action as defendant, if process is served as provided by Rule 4D(2)(g) and (h) for service upon such defendant.



**History:** En. Sec. 15, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### Amendments

The amendment of September 29, 1967 added the last sentence of the first paragraph and added the second paragraph.

#### Advisory Committee's Note to September 29, 1967 Amendment

Source: Fed. R. Civ. P. 15(c), as amended 1966.

**Explanation of change:** This amendment is designed to avoid problems which have arisen in instances in which the complaint named the wrong defendant and the statute of limitations expired prior to an amendment correcting the error. Where the newly named defendant received notice of the action and knew or should have known that he was the intended defendant, it seems unjust to prohibit relation back.

The most serious difficulties under the Federal Rules have been in suits against

the United States or an agency or officer thereof. The second paragraph of the federal amendment contains specific provisions for such cases and the second paragraph of this amendment adapts the federal provision to suits where the true defendant is the state or a political subdivision thereof.

The change will also further the objective of the provision of Rule 25(d) for automatic substitution of the successor public officer.

#### Amendment after Running of Limitations

If original complaint is timely filed, amended complaint dealing with same transaction set out in original complaint will relate back to original complaint, even though amended complaint changes legal theory of action, adds claim arising out of same transaction or states facts more specifically, and even though amended complaint is filed after running of statute of limitations. *Rozan v. Rosen*, 150 M 121, 431 P 2d 870.

### (d) SUPPLEMENTAL PLEADINGS.

#### Notice

Trial court was justified in refusing to grant defendants' motion to amend their answer by adding an affirmative defense of compromise and settlement, even though it was represented that some

sort of compromise settlement had been reached after filing of complaint and answer, since defendants had not given plaintiffs notice of this motion as required by this section. *Montgomery v. Gehring*, 145 M 278, 400 P 2d 403.

### Rule 16. Pretrial procedure—Formulating issues.

#### Discretion of Court

Pretrial procedure is optional, it being left to trial court's discretion whether to utilize procedure and to what extent. *Lenz v. Mehrens*, 149 M 394, 427 P 2d 297.

#### Issues on Appeal

Issues of waiver and breach of contract not covered by pretrial order could not be raised on appeal. *Davis v. Davis*, 159 M 355, 497 P 2d 315.

## IV. PARTIES

Rule 17. Parties plaintiff and defendant—Capacity.

18. Joinder of claims and remedies.
19. Joinder of persons needed for just adjudication.
20. Permissive joinder of parties.
23. Class actions.
- 23.1. Derivative actions by shareholders.
- 23.2. Actions relating to unincorporated associations.
24. Intervention.

### Rule 17. Parties plaintiff and defendant—Capacity.

(a) **REAL PARTY IN INTEREST.** Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining

with him the party for whose benefit the action is brought; and when a statute of the state of Montana so provides, an action for the use or benefit of another shall be brought in the name of the state of Montana. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

**History:** En. Sec. 17, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### Amendments

The amendment of September 29, 1967 deleted the conjunction "but" between the present first and second sentences and made them separate sentences; and added the third sentence.

#### Advisory Committee's Note to September 29, 1967 Amendment

Source: Fed. R. Civ. P. 17(a), as amended 1966.

A bailee is added to the list of real parties in interest; and a minor change is made in the text to make it clear that the specific instances enumerated are not exceptions to, but illustrations of, the rule, and carry no negative implications.

The provision that no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after the objection has been raised, for ratification, etc., keeps pace with modern decisions which, in the interests of justice, are inclined to be lenient when an honest mistake has been made in choosing the party in whose name the action is filed.

#### Assignee for Collection

Assignees of claim paid by their liability insurer were real parties in interest and entitled to sue their indemnitor and its insurer in their own names because the assignees had legal title to the claim and this was sufficient to constitute the assignees the real parties in interest. *Washington Water Power Co. v. Morgan Electric Co.*, 152 M 126, 448 P 2d 683.

#### Insurance Companies

In action for damages defendant was entitled to compel joinder of insurance company, which had paid most of plain-

tiff's losses, as the real party in interest, notwithstanding the collateral source rule. *State ex rel. Slovak v. District Court*, — M —, 534 P 2d 850.

Where plaintiff's insurance company paid all but \$25.00 of plaintiff's loss, so recovery from defendant would inure to benefit of insurance company, plaintiff's motion to add insurance company as real party in interest should have been granted by district court, even though statute of limitations had run on plaintiff's claim. *Bergh v. Rogers*, — M —, 536 P 2d 1190.

Insurer which has paid the entire loss suffered by its insured thereby becomes fully subrogated to his claim against the wrongdoer who caused it, and, because the insured no longer has a right of action, becomes a real party in interest in any litigation concerning the loss; therefore, the district court properly ordered the named plaintiff's insurer substituted for it as a party. *State ex rel. Nawd's T.V. and Appliance, Inc. v. District Court*, — M —, 543 P 2d 1336.

Partially subrogated insurer can be brought into tort action by ratification, joinder or substitution pursuant to this rule, and it was for the insurer to determine the mode of compliance. *State ex rel. Nawd's T.V. and Appliance, Inc. v. District Court*, — M —, 543 P 2d 1336; *State ex rel. Bohrer v. District Court*, — M —, 556 P 2d 899.

#### Oral Gift

Son was not real party in interest in action on stated account, based on oral gift to son, where buyer of goods was never aware that son was owner but dealt entirely through father. *Hanlon v. Anderson*, 160 M 279, 502 P 2d 51.

#### References

*State ex rel. Farmers Elevator Co. of Reserve v. District Court*, 147 M 72, 410 P 2d 160.

### Rule 18. Joinder of claims and remedies.

(a) JOINDER OF CLAIMS. A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims



either legal or equitable or both as he has against an opposing party or co-party.

**History:** En. Sec. 18, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### Amendments

The amendment of September 29, 1967 rewrote this rule. For text of former rule, see parent volume.

#### Advisory Committee's Note to September 29, 1967 Amendment

Source: Fed. R. Civ. P. 18(a), as amended 1966.

Explanation of change: Under the prior rule some courts have inferred that the standards of Rules 19, 20, and 22 relate to and limit Rule 18(a) in multiple party cases. Thus, Rule 20(a) resulted in a holding that, unless each claim arose from a single transaction or series of transactions and involved a question common to all defendants, there could be no joinder. *Federal Housing Admr. v. Christianson*, 26 F Supp 419 (D. Conn. 1939). This amendment is designed to overcome such decisions and to state clearly that a party asserting a claim (original claim, counterclaim, cross-claim, third party claim) may join as many claims as he has against an opposing party regardless of the fact that there are multiple parties. The joinder is subject to the court's power to direct appropriate procedure for trying the claims. See Rules 42(b), 20(b), 21. Joinder of parties is governed by other rules operating independently.

In addition to the changes in the Federal Rules the words "or co-party" are added to the Montana amendment for

consistency with the provisions of this amendment for cross-claims and Rule 13(g).

#### Divorce Proceedings

Where wife brought suit for divorce and husband filed cross complaint for adjudication of his right to property acquired by their joint effort, the general equity powers of the court were properly invoked by joining in a single action the prayer for divorce and adjudication of the dispute between the parties concerning property rights. *Tolson v. Tolson*, 145 M 87, 399 P 2d 754, explained in 157 M 252, 257, 484 P 2d 748.

In divorce proceedings, jointly held property may be partitioned by the district court, which has the power to settle and to adjust property jointly accumulated, regardless of whether the pleadings contain a specific prayer for partition. *Hodgson v. Hodgson*, 156 M 469, 482 P 2d 140.

In a divorce action a district court may completely divest the wife of her interest in property, no matter how it is held, and provide for the payment of alimony in lieu thereof; no particular pleading is required to raise question of equitable division of property; any pleading is sufficient which gives notice of pleader's intent to raise the issue; specific relief need not be requested. *Libra v. Libra*, 157 M 252, 484 P 2d 748, overruling *Emery v. Emery*, 122 M 201, 200 P 2d 251 and affirming rule of *Johnson v. Johnson*, 137 M 11, 349 P 2d 310.

### DECISIONS UNDER FORMER LAW

#### Assignor Bringing Action

Assignee of one-half interest of an overriding royalty agreement with plaintiff-assignor and defendant could not be joined as a party plaintiff in a suit to

compel defendant to pay the other half interest to plaintiff whether assignor was a trustee for the assignee or they were tenants in common. *Lowe & Lynn v. Flank Oil Co.*, 144 M 499, 398 P 2d 608.

#### Rule 19. Joinder of persons needed for just adjudication.

(a) **PERSONS TO BE JOINED IF FEASIBLE.** A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or,



in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

**History:** En. Sec. 19, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### Amendments

The amendment of September 29, 1967 rewrote this rule. For text of former rule, see parent volume.

#### Advisory Committee's Note to September 29, 1967 Amendment

Source: Fed. R. Civ. P. 19, as amended 1966.

**Explanation of change:** This is a substitution for existing Rule 19 in its entirety. The changes are intended to make clear that whenever feasible the persons materially interested in the subject of an action should be joined as parties so that they may be heard and a complete disposition made. When this comprehensive joinder cannot be accomplished the case should be examined pragmatically and a choice made between the alternatives of proceeding with the action in the absence of particular interested persons, and dismissing the action.

Even if the court is mistaken in its decision to proceed in the absence of an interested person, it does not by that token deprive itself of the power to adjudicate as between the parties already before it through proper service of process. But the court can make a legally binding adjudication only between the parties actually joined in the action. It is true that an adjudication between the parties before the court may on occasion adversely affect the absent person as a practical matter, or leave a party exposed to a later inconsistent recovery by the absent person. These are factors which should be considered in deciding whether the action should proceed, or should rather be dismissed;

but they do not themselves negate the court's power to adjudicate as between the parties who have been joined.

The change straightens out difficulties in the wording of the old rule. The word "indispensable" is used only in a conclusory sense, that is, a person is "regarded as indispensable" when he cannot be made a party and, upon consideration of the factors mentioned in subdivision (b), it is determined that in his absence it would be preferable to dismiss the action, rather than to retain it. The factors mentioned in subdivision (b) of the rule are not intended to be exclusive and others may be applicable in particular situations. The court is to determine whether in equity and good conscience the action should proceed among the parties already before it, or should be dismissed.

#### Injured Party in Dispute between Insurers

Party who brought original action for injuries but who was not party to either of policies of insurance involved and was only indirectly interested in outcome of litigation between two insurance companies was improper party in declaratory action to determine which of two insurance companies was liable. *National Farmers Union Property & Casualty Co. v. General Guaranty Ins. Co.*, 150 M 297, 434 P 2d 708.

#### Joinder of Party to Prior Action

Stipulation of owner of bulldozer to be bound by prior judgment even though not a party to previous action precluded subsequent complaint for damages to bulldozer, and there was no need to join him as a party to the previous action. *Morris v. McCarthy*, 159 M 236, 497 P 2d 102.

(b) **DETERMINATION BY COURT OF WHENEVER JOINDER NOT FEASIBLE.** If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

**History:** En. Sec. 19, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### **Amendments**

The amendment of September 29, 1967 rewrote this rule. For text of former rule, see parent volume.

#### **Advisory Committee's Note to September 29, 1967 Amendment**

Source: Fed. R. Civ. P. 19, as amended 1966.

Explanation of change: see Advisory Committee's Note under Rule 19(a).

#### **Determination Where Joinder Not Feasible**

In an action by a Montana bank to enforce notes held by it, but subject to a participation agreement between it and a national bank located out of state, joinder of the national bank was prohibited by federal law; thus, even if the national bank was deemed an indispensable party, the action was properly allowed without joinder of the national bank, since to hold otherwise would inequitably deny the Montana bank any remedy in the courts of its own state. *State ex rel. Drum v. District Court*, — M —, 548 P 2d 1377.

(c) **PLEADING REASONS FOR NONJOINDER.** A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

**History:** En. Sec. 19, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### **Amendments**

The amendment of September 29, 1967 rewrote this rule. For text of former rule, see parent volume.

#### **Advisory Committee's Note to September 29, 1967 Amendment**

Source: Fed. R. Civ. P. 19, as amended 1966.

Explanation of change: see Advisory Committee's Note under Rule 19(a).

(d) **EXCEPTION OF CLASS ACTIONS.** This rule is subject to the provisions of Rule 23.

**History:** En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### **Amendments**

The amendment of September 29, 1967 rewrote Rule 19 in general and added Rule 19(d) as a separate subdivision of the rule.

#### **Advisory Committee's Note to September 29, 1967 Amendment**

Source: Fed. R. Civ. P. 19, as amended 1966.

Explanation of change: see Advisory Committee's Note under Rule 19(a).

### **Rule 20. Permissive joinder of parties.**

(a) **PERMISSIVE JOINDER.** All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

**History:** En. Sec. 20, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### **Amendments**

The amendment of September 29, 1967 substituted "these persons" for "of them"

near the end of the first sentence; and "defendants" for "of them" near the end of the second sentence.

**Advisory Committee's Note to September 29, 1967 Amendment**

Source: Fed. R. Civ. P. 20(a), as amended 1966.

This amendment fits into the amendment to Rule 18, and clarifies the antecedent of the word "them."

**Scope**

The scope of this rule is procedural in nature and removes obstacles to joinder without affecting the substantive rights of

the parties, so that in a suit by real estate agents against buyer and seller, judgment for plaintiff would not, in effect, make the buyer a party to a prior contract between the agents and the seller. *Wheat v. Safeway Stores, Inc.*, 146 M 105, 404 P 2d 317.

**Surety Bond**

Action was properly brought against surety for enforcement of obligation on bond without joinder of principal. *Morgen & Oswood Constr. v. United States Fidelity & Guaranty Co.*, — M —, 535 P 2d 170.

**(b) SEPARATE TRIALS.**

**Disqualification of Judge**

Disqualification of trial judge did not make his previous order denying a severance of action against multiple defendants either *res judicata* or the law of the case,

and successor district judge could order severance on a new motion. *State ex rel. Stenberg v. Nelson*, 157 M 310, 486 P 2d 870.

**Rule 21. Misjoinder and nonjoinder of parties.**

**References**

*Wheat v. Safeway Stores, Inc.*, 146 M 105, 404 P 2d 317.

**Rule 23. Class actions.**

**(a) PREREQUISITES TO A CLASS ACTION.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

**History:** En. Sec. 23, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

**Compiler's Notes**

The order of September 29, 1967 revised Rule 23 in general and rewrote Rule 23(a) in particular. For text of former Rule 23(a), see parent volume.

**Taxpayers**

Affected taxpayers had standing under this rule to ask for declaratory judgment against boards of county commissioners which increased appraisals on ground that state board of equalization used wrong rates in assessing timberlands. *State ex rel. Conrad v. Managhan*, 157 M 335, 485 P 2d 948.

**(b) CLASS ACTIONS MAINTAINABLE.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: (1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the



other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

**History:** En. Sec. 23, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### Compiler's Notes

The order of September 29, 1967 re-wrote Rule 23 generally. For text of former Rule 23(b), "Secondary Action By Shareholders," see parent volume, and see Rule 23.1, "Derivative Actions By Shareholders" in this supplement.

#### Advisory Committee's Note to September 29, 1967 Amendment

Source: Fed. R. Civ. P. 23, as amended 1966.

Explanation of change: The amended

rule describes in more practical terms than existed under the old rule the occasions for maintaining class actions; provides that all actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class; and refers to the measures which can be taken to assure the fair conduct of these actions. It is designed to clear up difficulties in drawing distinctions between joint, common, secondary or several rights, and in defining categories in terms of "true," "hybrid," and "spurious," and to give a better guide to the extent and binding effect of judgments.

#### (c) DETERMINATION BY ORDER WHETHER CLASS ACTION TO BE MAINTAINED—NOTICE—JUDGMENT—ACTIONS CONDUCTED PARTIALLY AS CLASS ACTIONS.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class,

shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

**History:** En. Sec. 23, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### Compiler's Notes

The order of September 29, 1967 re-wrote Rule 23 generally. Former Rule 23(c), "Dismissed On Compromise," was somewhat similar to present Rule 23(e). For text of former rules, see parent volume.

#### Advisory Committee's Note to September 29, 1967 Amendment

Source: Fed. R. Civ. P. 23, as amended 1966.

Explanation of change: In order to avoid the necessity for awaiting final judgment before obtaining review by the supreme court of an order under subdivision

(c)(1) refusing to permit a class action to be maintained as such, Rule 1(b) of the Montana Rules of Appellate Civil Procedure is amended to make such an order appealable. There does not seem to be a corresponding necessity for direct appeal, as distinct from appeal from the final judgment, where the court determines that the action may be maintained as a class action.

#### Supervisory Writ

Defendants were not entitled to a supervisory writ against trial court's ruling that action could be maintained as a class action; under subdivision (d) trial court could alter or amend its order as the litigation progresses. State ex rel. Anaconda Aluminum Co. v. District Court, 158 M 228, 490 P 2d 351.

(d) **ORDER IN CONDUCT OF ACTIONS.** In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

**History:** En. Sec. 23, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### Compiler's Notes

The order of September 29, 1967 re-wrote Rule 23 generally. For text of former Rule 23(d), "Orders To Ensure Adequate Representation," see parent volume.

(e) **DISMISSAL OR COMPROMISE.** A class action shall not be dismissed or compromised without the approval of the court, and notice



of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

**History:** En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

**Compiler's Notes**

The order of September 29, 1967 re-

wrote Rule 23 generally and added Rules 23(e) and 23(f). For text of former Rule 23(c), "Dismissal or Compromise," see parent volume.

(f) **SECURITY FOR COSTS.** Security for costs and charges, which may be awarded against a representative party, may be required by an opposing party. When required, all proceedings in the action must be stayed until an undertaking, executed by two or more persons, is filed with the clerk, to the effect that they will pay such costs and charges as may be awarded against the representative party by judgment, or in the progress of the action, not exceeding the sum of one thousand dollars. A new or an additional undertaking may be ordered by the court or judge, upon proof that the original undertaking is insufficient security, and proceedings in the action stayed until such new or additional undertaking is executed and filed.

**History:** En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

**Compiler's Notes**

The order of September 29, 1967 re-wrote Rule 23 generally and added Rules 23(e) and 23(f).

**Advisory Committee's Note to September 29, 1967 Amendment**

Explanation of change: In addition to the changes of the Federal Rule [23], subdivision (f) is added to the Montana Rules in order to afford protection against selection of a representative party who may not be responsible for costs and charges.

**Rule 23.1. Derivative actions by shareholders.**

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

**History:** En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

**Advisory Committee's Note to September 29, 1967 Amendment**

Source: Fed. R. Civ. P. 23.1, as adopted 1966.

Explanation of change: A derivative action by a shareholder of a corporation or by a member of an unincorporated association has distinctive aspects which require the special provisions set forth in the new

rule. The next-to-the-last sentence recognizes that the question of adequacy of representation may arise when the plaintiff is one of a group of shareholders or members.

The court has inherent power to provide for the conduct of the proceedings in a derivative action, including the power to determine the course of the proceedings and require that any appropriate notice be given to shareholders or members.

The Montana amendment conforms to



the 1966 federal amendment, except that it omits the federal provision that the complaint be verified and allege "(1) that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law, and (2) that the action is not a collusive one to confer jurisdiction

on a court of the United States which it would not otherwise have." No reason is apparent for requiring a verified complaint in this type of action and not in others, and the allegations required by the federal amendment and omitted from this proposal appear to be designed to prevent abuse of federal jurisdiction and to be unnecessary in state practice.

### **Rule 23.2. Actions relating to unincorporated associations.**

An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. In the conduct of the action the court may make appropriate orders corresponding with those described in Rule 23(d), and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23(e).

**History:** En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### **Advisory Committee's Note**

**Source:** Fed. R. Civ. P. 23.2, as adopted 1966.

**Explanation of change:** Although an action by or against representatives of the membership of an unincorporated associ-

ation has often been viewed as a class action, the real or main purpose of this characterization has been to give "entity treatment" to the association when for formal reasons it cannot sue or be sued as a jural person under Rule 17. Rule 23.2 deals separately with these actions, referring where appropriate to Rule 23.

### **Rule 24. Intervention.**

(a) **INTERVENTION OF RIGHT.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

**History:** En. Sec. 24, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### **Amendments**

The amendment of September 29, 1967 rewrote item (2), substituting it for former items (2) and (3), allowing intervention when representation of applicant's interest might be inadequate and he might be bound by judgment and when applicant would be adversely affected by court's disposition of property.

#### **Advisory Committee's Note to September 29, 1967 Amendment**

**Source:** Fed. R. Civ. P. 24(a), as amended 1966.

**Explanation of change:** Subdivision (2) is changed because a class member who claims that his "representative" does not adequately represent him, and is able to

establish that proposition with sufficient probability, should not, as was required under the prior rule, be put to the risk of having a judgment entered in the action which by its terms extends to him, and be obliged to test the validity of the judgment as applied to his interest by a later collateral attack. Rather he should, as general rule, be entitled to intervene in the action.

The amendment provides that an applicant is entitled to intervene in an action when his position is comparable to that of a person under Rule 19(a)(2)(i), as amended, unless his interest is already adequately represented in the action by existing parties. The Rule 19(a)(2)(i) criterion imports practical consideration, and the deletion of the "bound" language similarly frees the rule from undue preoccupation with strict considerations of res judicata.

The representation whose adequacy comes into question under the amended rule is not confined to formal representation like that provided by a trustee for his beneficiary or a representative party in a class action for a member of the class. A party to an action may provide practical representation to the absentee seeking intervention although no formal relationship exists between them, and the adequacy of this practical representation will then have to be weighed.

Subdivision (3) is deleted for if an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule,

be entitled to intervene, and his right to do so should not depend on whether there is a fund to be distributed or otherwise disposed of as was required under that subdivision. Intervention of right is here seen to be a kind of counterpart to Rule 19(a)(2)(i) on joinder of persons needed for a just adjudication: where, upon motion of a party in an action, an absentee should be joined so that he may protect his interest which as a practical matter may be substantially impaired by the disposition of the action, he ought to have a right to intervene in the action on his own motion.

(c) **PROCEDURE.** A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute gives a right to intervene. When the constitutionality of an act of the legislative assembly affecting the public interest is drawn in question in any action to which neither the state nor any agency or officer thereof is a party, the court shall notify the attorney general of the state and the attorney general may within 20 days thereafter intervene in the same manner on behalf of the state.

**History:** En. Sec. 24, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### **Amendments**

The amendment of September 29, 1967, in the first sentence, substituted "the" for "all" before "parties" and "as provided in Rule 5" for "affected thereby" after "parties."

**Advisory Committee's Note to September 29, 1967 Amendment**

Source: Fed. R. Civ. P. 24(a), as amended 1963.

Explanation of change: This amendment conforms to the amendment of Rule 5(a). See note to that amendment.

### **Rule 25. Substitution of parties.**

#### **(a) DEATH.**

##### **Waiver of Substitution Requirements**

Failure of plaintiff to substitute executrix of doctor's estate for doctor, in tort action initiated against doctor before his death was waived where attorneys for doctor were also attorneys for executrix,

attorneys and executrix were present at trial of action and attorneys for executrix had filed motion for additional time in which to perfect appeal from judgment against doctor. *Nagaard v. Feda*, 149 M 190, 425 P 2d 79.

## **V. DEPOSITIONS AND DISCOVERY**

- Rule 26. General provisions governing discovery.  
 28. Persons before whom depositions may be taken.  
 29. Stipulations regarding discovery procedure.  
 30. Depositions upon oral examination.  
 31. Depositions upon written questions.  
 32. Use of depositions in court proceedings.  
 33. Interrogatories to parties.  
 34. Production of documents and things and entry upon land for inspection and other purposes.  
 35. Physical and mental examination of persons.  
 36. Requests for admissions.  
 37. Failure to make discovery: sanctions.

**Rule 26. General provisions governing discovery.**

(a) **DISCOVERY METHODS.** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited.

**History:** En. Sec. 26, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

**Advisory Committee's Comment on December 31, 1975 Amendment**

It is the consensus of the Advisory Committee that the discovery procedure in the Montana Courts should coincide with the Federal practice.

**Amendments**

The amendment of December 31, 1975, completely rewrote this rule to conform with Rule 26 FRCP. For prior version see parent volume.

(b) **SCOPE OF DISCOVERY.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Insurance agreements. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) Trial preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.



A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

**History:** En. Sec. 26, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

#### **Amendments**

The amendment of December 31, 1975, completely rewrote this rule to conform with Rule 26 FRCP. For prior version, see parent volume.

**Advisory Committee's Comment on December 31, 1975 Amendment**

It is the consensus of the Advisory Committee that the discovery procedure in the Montana Courts should coincide with the Federal practice.

**Identity of Witnesses**

The identity of a traffic engineer who will testify in a collision case involving a question of concurrent negligence is discoverable under this rule. *Smith v. Babcock*, 157 M 81, 482 P 2d 1014.

**Interrogatories**

Interrogatories by rate protestors to Public Service Commission, seeking information as to amounts, values, costs, and details of parts of property, were unrelated to main inquiry of lawfulness or reasonableness of rates, and such information was thus privileged and not relevant under this rule. *Public Service Comm. of Montana v. District Court*, — M —, 511 P 2d 334.

**Unreasonable Requests**

In action by insured against insurance company seeking damages for breach of

contract and punitive damages for violations of the insurance code, trial court abused discretion in ordering answer to interrogatory requesting names and addresses of all persons within the state who had made a claim against the insurance company and whose claims the insurance company had either refused to pay or had not paid in full during the last three years; even if relevant and material to issues pleaded, the interrogatory was unreasonable since the value of the information sought did not bear a reasonable relationship to the annoyance and expense involved in answering the interrogatory. *State ex rel. Bankers Life & Casualty Co. v. Miller*, 160 M 256, 502 P 2d 27.

**References**

*State ex rel. State Highway Commission v. District Court*, 147 M 348, 412 P 2d 832.

(c) **PROTECTIVE ORDERS.** Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

**History:** En. Sec. 26, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

**Amendments**

The amendment of December 31, 1975, completely rewrote this rule to conform with Rule 26 FRCP. For prior version, see parent volume.

**Advisory Committee's Comment on December 31, 1975 Amendment**

It is the consensus of the Advisory Committee that the discovery procedure in the Montana Courts should coincide with the Federal practice.

(d) **SEQUENCE AND TIMING OF DISCOVERY.** Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

**History:** En. Sec. 26, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

#### **Amendments**

The amendment of December 31, 1975, completely rewrote this rule to conform with Rule 26 FRCP. For prior version, see parent volume.

#### **Advisory Committee's Comment on December 31, 1975 Amendment**

It is consensus of the Advisory Committee that the discovery procedure in the Montana Courts should coincide with the Federal practice.

(e) **SUPPLEMENTATION OF RESPONSES.** A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

**History:** En. Sec. 26, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

#### **Amendments**

The amendment of September 29, 1967 inserted reference to Rule 28(b) and "the" after "require the exclusion of."

The amendment of December 31, 1975, completely rewrote this rule to conform with Rule 26 FRCP. For prior version, see parent volume and prior amendment note.

#### **Advisory Committee's Note to September 29, 1967 Amendment**

Source: Fed. R. Civ. P. 26(e), as amended 1963.

Explanation of change: This amendment conforms to the amendment of Rule 28(b).

#### **Advisory Committee's Comment on December 31, 1975 Amendment**

It is the consensus of the Advisory Committee that the discovery procedure in the Montana Courts should coincide with the Federal practice.

(f) **REPEALED.**

#### **Repeal**

This rule (En. Sec. 26, Ch. 13, L. 1961), relating to the effect of taking

and using depositions, was repealed by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.



**Rule 28. Persons before whom depositions may be taken.**

(b) **IN FOREIGN COUNTRIES.** In a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony, or (3) pursuant to letter rogatory. A commission or a letter rogatory shall be issued on application and notice, and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in [here name the country]." Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these Rules.

**History:** En. Sec. 28, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

**Amendments**

The amendment of September 29, 1967 deleted "state or" after "In a foreign"; substituted "may" for "shall" after "depositories"; and rewrote the remainder of the Rule. For text of former Rule, see parent volume.

**Advisory Committee's Note to September 29, 1967 Amendment**

Source: Fed. R. Civ. P. 28(b), as amended 1963.

Explanation of change: The amendment of clause (1) is designed to facilitate depositions in foreign countries by enlarging the class of persons before whom the depositions may be taken on notice.

It makes clear that the appointment of a person by commission in itself confers

power upon him to administer any necessary oath.

It negates the judicial requirement sometimes stated that letters rogatory will not issue unless the use of a notice or commission is shown to be impossible or impractical. It permits a sound choice between depositions under a letter rogatory and on notice or by commission in the light of all the circumstances.

In executing a letter rogatory the courts of other countries may be expected to follow their customary procedure for taking testimony. The last sentence of the amended subdivision provides, contrary to the implications of some authority, that evidence recorded in such a fashion need not be excluded on that account. Whether or to what degree the value or weight of the evidence may be affected by the method of taking or recording the testimony is left for determination according to the circumstances of the particular case.

(e) **DEPOSITION TO BE TAKEN IN SISTER STATES AND FOREIGN COUNTRIES FOR USE IN THIS STATE.** Whenever the deposition of any person is to be taken in a sister state or a foreign country, or any other jurisdiction, foreign or domestic, for use in this state, pursuant either to notice or stipulation, the Clerk or equivalent officer of any Court having jurisdiction at the place where the witness is to be served or the deposition taken, upon proof that notice has been duly served for taking of the deposition or that the parties have stipulated to such taking, may issue the necessary subpoenas or equivalent court instruments to require such witness to attend for the taking of the

deposition at the time and place in the sister state or foreign country, or any other jurisdiction, foreign or domestic, designated in the notice or stipulation.

**History:** En. Sup. Ct. Ord. 10750-8, Sept. 10, 1968, eff. Jan. 1, 1969.

**Advisory Committee's Note**

Officials in some sister states have in-

sisted upon some specific authorization for the issuance of subpoenas by them for use in Montana litigation. The amendment provides that authority.

**Rule 29. Stipulations regarding discovery procedure.**

Unless the Court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules for other methods of discovery.

**History:** En. Sec. 29, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

**Advisory Committee Comment on December 31, 1975 Amendment**

The Committee recommended that the last portion of the Federal rule which requires Court approval for a stipulation for extension of time be omitted. It was the feeling of the Committee that these stipulations do not present a problem which requires the attention of the Court.

**Amendments**

The amendment of December 31, 1975, substituted "unless the Court orders otherwise, the parties may by written stipulation (1) provide that" at the beginning of the rule for "if the parties so stipulate in writing"; and added subdivision (2).

**Rule 30. Depositions upon oral examination.**

(a) **WHEN DEPOSITIONS MAY BE TAKEN.** After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(c), except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subdivision (b)(2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

**History:** En. Sec. 30, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

with Rule 30 FRCP. For prior version, see parent volume.

**Amendments**

The amendment of December 31, 1975, completely rewrote this rule to conform

**Advisory Committee's Comment on December 31, 1975 Amendment**

This will make all rules pertaining to discovery coincide with the Federal rules.

(b) **NOTICE OF EXAMINATION: GENERAL REQUIREMENTS; SPECIAL NOTICE; NON-STENOGRAPHIC RECORDING; PRODUCTION OF DOCUMENTS AND THINGS; DEPOSITION OF ORGANIZATION.**

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party

to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) Leave of court is not required for the taking of a deposition by plaintiff if the notice (A) states that the person to be examined is about to go out of the district where the action is pending and more than 100 miles from the place of trial, or is about to go out of the United States, or is bound on a voyage to sea, and will be unavailable for examination unless his deposition is taken before expiration of the 30-day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information, and belief the statement and supporting facts are true. The sanctions provided by Rule 11 are applicable to the certification.

If a party shows that when he was served with notice under this subdivision (b)(2) he was unable through the exercise of diligence to obtain counsel to represent him at the taking of the deposition, the deposition may not be used against him.

(3) The court may for cause shown enlarge or shorten the time for taking the deposition.

(4) The court may upon motion order that the testimony at a deposition be recorded by other than stenographic means, in which event the order shall designate the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If the order is made, a party may nevertheless arrange to have a stenographic transcription made at his own expense.

(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request.

(6) A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.



**History:** En. Sec. 30, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

#### Amendments

The amendment of December 31, 1975, completely rewrote this rule to coincide with Rule 30 FRCP. For prior version, see parent volume.

#### Advisory Committee's Comment on December 31, 1975 Amendment

This will make all rules pertaining to discovery coincide with the Federal rules.

#### Attorney and Client

Protective relief was granted to strike from an amended complaint quotations and purported quotations from legal opinions prepared by defendant's attorneys for defendant and turned over to plaintiff's attorney in accordance with in camera inspection ordered by the district

court, which provided that the opinions were to be treated as confidential material and were not to be made a part of the court record or otherwise disclosed to other persons. *State ex rel. Union Oil Co. of California v. District Court*, 160 M 229, 503 P 2d 1008.

#### Limitation of Examination

In a libel action it was not error for the trial judge to issue a minute entry order refusing to require the defendant to answer questions submitted by the plaintiff as the court has the power to limit the examination and protect him from annoyance, embarrassment or oppression. *Steffes v. Crawford*, 143 M 43, 386 P 2d 842.

#### References

*State ex rel. State Highway Commission v. District Court*, 147 M 348, 412 P 2d 832.

(c) EXAMINATION AND CROSS-EXAMINATION; RECORD OF EXAMINATION; OATH; OBJECTIONS. Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of Rule 43(b). The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with subdivision (b)(4) of this rule. If requested by one of the parties, the testimony shall be transcribed.

All objections made at time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and he shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

**History:** En. Sec. 30, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

#### Amendments

The amendment of December 31, 1975, inserted the first sentence in the first paragraph; substituted the last two sentences of the first paragraph for "The testimony shall be taken stenographically and transcribed unless the parties agree otherwise"; and substituted "parties may

serve written questions in a sealed envelope on the party taking the deposition and he shall transmit them to the officer" in the last sentence of the second paragraph for "parties served with notice of taking a deposition may transmit written interrogatories to the officer."

#### Advisory Committee's Comment on December 31, 1975 Amendment

This will make all rules pertaining to discovery coincide with the Federal rules.

(d) MOTION TO TERMINATE OR LIMIT EXAMINATION. At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, em-

barrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a) (4) apply to the award of expenses incurred in relation to the motion.

**History:** En. Sec. 30, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

#### Amendments

The amendment of December 31, 1975, substituted "the court in the district" in the first sentence for "in the event that the deposition is being taken in an action pending in another state or country, the district court in the county"; substituted "Rule 26(c)" at the end of the first sentence for "subdivision (b)"; substituted

the present last sentence for "In granting or refusing such order the court may impose upon either party or upon the witness the requirement to pay such costs or expenses as the court may deem reasonable"; and made minor changes in phraseology and punctuation.

#### Advisory Committee's Comment on December 31, 1975 Amendment

This will make all rules pertaining to discovery coincide with the Federal rules.

(e) **SUBMISSION TO WITNESS; CHANGES; SIGNING.** When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress under Rule 32 (d) (4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

**History:** En. Sec. 30, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

#### Amendments

The amendment of December 31, 1975, inserted "within 30 days of its submission to him" in the last sentence; inserted

"(4)" after "Rule 32(d)" in the last sentence; and made a minor change in punctuation.

#### Advisory Committee's Comment on December 31, 1975 Amendment

This will make all rules pertaining to discovery coincide with the Federal rules.

(f) **CERTIFICATION AND FILING BY OFFICER; EXHIBITS; COPIES; NOTICE OF FILING.** (1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of [here insert name of witness]"

and shall promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing.

Documents and things produced for inspection during the examination of the witness, shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party, except that (A) the person producing the materials may substitute copies to be marked for identification, if he affords to all parties fair opportunity to verify the copies by comparison with the originals, and (B) if the person producing the materials requests their return, the officer shall mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them, and the materials may then be used in the same manner as if annexed to and returned with the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

**History:** En. Sec. 30, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

#### Amendments

The amendment of September 29, 1967, in clause (1), inserted "as certified" before "mail to the clerk" in the last sentence.

The amendment of December 31, 1975, added the second paragraph of subdivision (1); substituted present subdivision (3) for subdivision (3) as it appears in the parent volume; and made minor changes in punctuation.

#### Advisory Committee's Note to September 29, 1967 Amendment

Source: Fed. R. Civ. P. 30(f), as amended 1963.

This proposal is patterned after the 1963 federal amendment, and conforms to provisions of Rule 4 which permit the use of certified mail as an alternative to the use of registered mail.

#### Advisory Committee's Comment on December 31, 1975 Amendment

This will make all rules pertaining to discovery coincide with the Federal rules.

#### Failure to File

Failure of court reporter to file original copies of depositions in accordance with this rule was at most harmless error where there was ample time to discover this fact and no objection was made. *Mustang Beverage Co., Inc. v. Jos. Schlitz Brewing Co.*, — M —, 511 P 2d 1.

### (g) FAILURE TO ATTEND OR TO SERVE SUBPOENA; EXPENSES.

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other



party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

**History:** En. Sec. 30, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

#### Amendments

The amendment of December 31, 1975, deleted "the amount of" before "reason-

able expenses" in each subdivision; and made minor changes in phraseology.

#### Advisory Committee's Comment on December 31, 1975 Amendment

This will make all rules pertaining to discovery coincide with the Federal rules.

### Rule 31. Depositions upon written questions.

(a) **SERVING QUESTIONS; NOTICE.** After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 30(b)(6).

Within 30 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 10 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 10 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

**History:** En. Sec. 31, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

#### Amendments

The amendment of December 31, 1975, completely rewrote this rule to coincide with Rule 31 FRCP. For prior version, see parent volume.

(b) **OFFICER TO TAKE RESPONSES AND PREPARE RECORD.** A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30 (c), (e), and (f), to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by him.

**History:** En. Sec. 31, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

#### Amendments

The amendment of December 31, 1975, substituted "questions" throughout the section for "interrogatories."

(c) **NOTICE OF FILING.** When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.

**History:** En. Sec. 31, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

deleted the former first sentence as it appears in the parent volume; substituted "party taking it" for "clerk of court"; and inserted "other" before "parties."

#### **Amendments**

The amendment of December 31, 1975,

#### **(d) REPEALED.**

#### **Repeal**

This rule (En. Sec. 31, Ch. 13, L. 1961), relating to protection of parties and de-

ponents, was repealed by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

### **Rule 32. Use of depositions in court proceedings.**

(a) **USE OF DEPOSITIONS.** At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any State has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

**History:** En. Sec. 32, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

#### **Amendments**

The amendment of December 31, 1975, substituted the present rule for the former

rule which now appears as M. R. Civ. P. Rule 32 (d), subdivision (1).

(b) **OBJECTIONS TO ADMISSIBILITY.** Subject to the provisions of Rule 28(b) and subdivision (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

**History:** En. Sec. 32, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

**Amendments**

The amendment of December 31, 1975, substituted the present rule for the former rule which now appears as M. R. Civ. P. Rule 32 (d), subdivision (2).

(c) **EFFECT OF TAKING OR USING DEPOSITIONS.** A party does not make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition under subdivision (a)(2) of this rule. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

**History:** En. Sec. 32, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

**Amendments**

The amendment of December 31, 1975, substituted the present rule for the former rule which now appears as M. R. Civ. P. Rule 32 (d), subdivision (3).

(d) **EFFECT OF ERRORS AND IRREGULARITIES IN DEPOSITIONS.**

(1) As to notice. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) As to disqualification of officer. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) As to taking of deposition.

(A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.



(C) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(4) As to completion and return of deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

**History:** En. Sec. 32, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

designated the former rule as subdivision (4) and inserted former Rules 32 (a) through 32 (c) as subdivisions (1) through (3).

#### **Amendments**

The amendment of December 31, 1975,

### **Rule 33. Interrogatories to parties.**

(a) **AVAILABILITY; PROCEDURES FOR USE:** Any party may serve upon any other party written interrogatories to be answered by the parties served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of Court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. A party serving interrogatories upon an adverse party shall file the same in the Court in which the action is pending.

Each interrogatory shall be answered separately and fully in writing under oath unless it is objected to in which event the reasons for objection shall be stated in lieu of an answer. The party answering the interrogatories shall set forth a verbatim recopy of each of the interrogatories, followed by the answer thereto, and shall file the answers in the Court in which the action is pending. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

(b) **SCOPE; USE AT TRIAL.** Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until

after designated discovery has been completed or until a pre-trial conference or other later time.

(c) **OPTION TO PRODUCE BUSINESS RECORDS.** Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

**History:** En. Sec. 33, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965; amd. Sup. Ct. Ord. 10750, Nov. 28, 1966, eff. Jan. 1, 1967; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

#### Amendments

The amendment of April 1, 1965 added a third paragraph which read: "A party desiring to serve interrogatories upon an adverse party shall file and serve a copy thereof upon every other party. The party answering the interrogatories shall file the answers in the court in which the action is pending and serve a copy thereof upon every other party."

The amendment of November 28, 1966, in the first paragraph, inserted the second and fourth sentences and substituted "for answer shall serve a copy of the answers upon every party who has made a written appearance" for "shall serve a copy of the answers on the party submitting the interrogatories" in the fifth sentence; and deleted the paragraph added in 1965.

The amendment of December 31, 1975, designated the former first paragraph as subdivision (a) and divided it into two paragraphs; substituted "other party" in the first sentence of the first paragraph of subdivision (a) for "adverse party, who has been served with process or who has appeared"; inserted "or government agency" in the first sentence of the first paragraph of subdivision (a); inserted the second sentence of the first paragraph of subdivision (a); added "unless it is objected to in which event the reasons for objection shall be stated in lieu of an answer" to the first sentence of the second paragraph of subdivision (a); substituted the third and fourth sentences of the second paragraph for "The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served for answer shall serve a copy of the answers upon every party who has made written

appearance within 20 days after the service of interrogatories upon him, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time"; substituted the present last two sentences of subdivision (a) for the last two sentences of the former first paragraph as they appear in the parent volume; substituted the present subdivision (b) for the former second paragraph as it appears in the parent volume; added present subdivision (c); and made minor changes in phraseology and punctuation.

#### Commission Note to 1965 Amendment

This amendment is consistent with Rule 5. The requirement of service of interrogatories and answers upon all other parties to the litigation may save other parties additional time and effort in duplication of interrogatories resultant from lack of knowledge of what other parties have done. The requirement of filing of answers makes them available to judges who may want to see them.

#### Commission Note to 1966 Amendment

To put the interrogatories and answers into one document for convenience of use, and to remove any obstacle to the service of interrogatories which may result from the requirement of service upon "every other party."

#### Identity of Witnesses

Failure to identify witnesses in response to specific interrogatories substantially affected rights of party, entitling him to a new trial. *Sanders v. Mount Haggin Livestock Co.*, 160 M 73, 500 P 2d 397.

#### Public Service Rate Protest

Rate protestors' interrogatories to Public Service Commission seeking amounts, values, costs, and details of parts of property, were irrelevant to main inquiry of "lawfulness" or "reasonableness" of rates. *Public Service Comm.*

of *Montana v. District Court*, — M —, 511 P 2d 334.

### Scope

Although this section should be liberally construed to make all relevant facts available to parties in advance of trial and to reduce the possibilities of surprise and unfair advantage, it cannot become a weapon for punishment or forfeiture, or an instrument for the avoidance of a trial on the merits. *Wolfe v. Northern Pacific Ry. Co.*, 147 M 29, 409 P 2d 528.

### Unreasonable Requests

In action by insured against insurance company seeking damages for breach of contract and punitive damages for alleged

violations of the insurance code, trial court abused its discretion by ordering answer to interrogatory requesting names and addresses of all persons within the state of Montana who had made a claim against the insurance company and whose claims the insurance company had either refused to pay or had not paid in full during the last three years; even if relevant material to issues pleaded, the interrogatory was unreasonable since the value of the information sought did not bear a reasonable relationship to the annoyance and expense involved in answering the interrogatory. *State ex rel. Bankers Life & Casualty Co. v. Miller*, 160 M 256, 502 P 2d 27.

**Rule 34. Production of documents and things and entry upon land for inspection and other purposes.**

(a) **SCOPE.** Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) **PROCEDURE.** The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.



(c) PERSONS NOT PARTIES. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

History: En. Sec. 34, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

have been allowed. State ex rel. State Highway Commission v. District Court, 147 M 348, 412 P 2d 832.

#### Amendments

The amendment of December 31, 1975, completely rewrote this rule to coincide with Rule 34 FRCP. For prior version, see parent volume.

#### Inspection of Land

State's motion for inspection to drill wells on condemnee's property should

#### Real Estate Appraisals

In proceeding to condemn strip of land in front of leased building, highway commission could not be compelled by lessee to produce appraisals containing no opinion as to damages to, or value of, leasehold. State Highway Commission v. District Court, 149 M 384, 427 P 2d 49.

### Rule 35. Physical and mental examination of persons.

(a) ORDER FOR EXAMINATION. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

History: En. Sec. 35, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

substituted the present first sentence for the one appearing in the parent volume; substituted "person" before "to be examined" in the second sentence for "party"; and deleted "other" before "parties" in the second sentence.

#### Amendments

The amendment of December 31, 1975,

### (b) REPORT OF EXAMINING PHYSICIAN.

(1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings, including results of all tests made, diagnosis and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician fails or refuses to make a report the court may exclude his testimony if offered at the trial, or may hold him in contempt of court, or both.

(2) Waiver of Privilege. Either by (1) requesting and obtaining a report of the examination ordered as provided herein, or by taking the deposition of the examiner, or by (2) commencing an action or asserting

a defense which places in issue the mental or physical condition of a party to the action, the party examined or a party to the action waives any privilege he may have in that action or any other action involving the same controversy, regarding the testimony of every person who has treated, prescribed, consulted, or examined or may thereafter treat, consult, prescribe or examine, such party in respect to the same mental or physical condition; but such waiver shall not apply to any treatment, consultation, prescription or examination for any mental or physical condition not related to the pending action. Upon motion seasonably made, and upon notice and for good cause shown, the court in which the action is pending, may make an order prohibiting the introduction in evidence of any such portion of the medical record of any person as may not be relevant to the issues in the pending action.

(3) This subdivision also applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examining physician or the taking of a deposition of the physician or the taking of a deposition of the physician in accordance with the provisions of any other rule.

**History:** En. Sec. 35, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-6, Sept. 29, 1967, eff. Jan. 1, 1968; amd. Sup. Ct. Ord.

**History:** En. Sec. 35, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

#### Amendments

The amendment of September 29, 1967 rewrote clause (2). For text of former rule, see parent volume.

The 1971 amendment inserted "or asserting a defense" near the beginning of clause (2) of the first sentence of subdivision (b) (2); and substituted "a party to the action" for "the party bringing the action" in two places in the same clause.

The amendment of December 31, 1975, substituted the present subdivision (1) for the subdivision (1) appearing in the parent volume; and added subdivision (3).

#### Advisory Committee's Note to September 29, 1967 Amendment

This amendment extends the existing modification by Rule 35 of subparagraph 4 of R. C. M. 1947, sec. 93-701-4. The

purpose is to facilitate the obtaining of competent medical testimony and the use of testimony of the original attending physician, especially in personal injury cases. The proposal coincides with the view recommended in Wigmore on Evidence (McNaughton rev. 1961), Vol. VIII, secs. 2380 and 2380a.

#### Advisory Committee's Comment on December 31, 1975 Amendment

It was felt that the provisions found in paragraph (2) relative to waiver of privilege should be retained. Otherwise the rule is amended to coincide with the Federal Rule.

#### Physician-Patient Privilege

By filing medical malpractice suit and submitting attending physicians for deposition purposes, patient permanently waived any privilege concerning her eye which was subject matter of suit; order that defense counsel be allowed private conference with physicians was proper. Callahan v. Burton, 157 M 513, 487 P 2d 515.

### Rule 36. Requests for admissions.

(a) **REQUEST FOR ADMISSION.** A party may serve upon any other party a written request for the admission, for purposes of the pending action, only, of the truth of any matters within the scope of Rule 26 (b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of

court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon him. If objection is made, the reasons therefor shall be stated. The answers shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why he cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

**History:** En. Sec. 36, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

#### **Amendments**

The amendment of December 31, 1975, completely rewrote this rule to coincide with Rule 36 FRCP. For prior version, see parent volume.

#### **Answers Filed Late**

Trial court did not abuse its discretion in allowing answers to request for admissions to be filed after time limit had expired since filing delay was accidental and no prejudice to requesting party was shown. *Heller v. Osburnsen*, — M —, 510 P 2d 13.

Where defendants in action for wrongful death stemming from automobile accident failed to answer requests for admissions from plaintiffs over period of 8½ months, with intervening admonition during pretrial conference, there was no abuse of discretion by district court in striking response and deeming requested facts admitted. *Morast v. Auble*, — M —, 519 P 2d 157.

#### **Central Issues in Controversy**

Request for admissions could not be ignored simply because it dealt with central issues which might in good faith be deemed controverted. *Morast v. Auble*, — M —, 519 P 2d 157.



**Construction**

The intent of this rule is that the party served shall make a sworn statement of the truth of any relevant matters of fact set forth in the request for admissions. *Daniels v. Paddock*, 145 M 207, 399 P 2d 740.

**Discretion of Trial Court**

Where defendant failed to file admissions on plaintiff's request and was not permitted to file them later or to reopen hearing on summary judgment, whether defendant's admissions, which were signed and verified by defendant's counsel as being made from a letter received from the defendant, met the intent of this rule was a matter within the discretion of the trial court. *Daniels v. Paddock*, 145 M 207, 399 P 2d 740.

**Failure To Answer**

In suit by client against his attorney

for money which attorney failed to forward to client, request for admissions were deemed admitted where attorney failed to answer. *Daniels v. Paddock*, 145 M 207, 399 P 2d 740.

**Late Filing of Response**

Refusal to permit late filing by plaintiffs of responses to request for admissions in wrongful death action was not an abuse of discretion where there was an eight and a half month delay in filing with an intervening admonition to respond made during pretrial conference and where names of an eyewitness and an investigating highway patrolman had been furnished to plaintiffs through answers to their interrogatories. *Morast v. Auble*, — M —, 519 P 2d 157.

**References**

*Olson v. City Commission of City of Helena*, 146 M 386, 407 P 2d 374.

(b) EFFECT OF ADMISSION. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

History: En. Sec. 36, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

**Amendments**

The amendment of December 31, 1975, inserted the first two sentences; and made minor changes in phraseology.

**Rule 37. Failure to make discovery: sanctions.**

(a) MOTION FOR ORDER COMPELLING DISCOVERY. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) Appropriate court. An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) Motion. If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to per-

mit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) Evasive or incomplete answer. For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) Award of expenses of motion. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

**History:** En. Sec. 37, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

v. Northern Pacific Ry. Co., 147 M 29, 409 P 2d 528.

#### Amendments

The amendment of December 31, 1975, completely rewrote the rule to coincide with Rule 37 FRCP. For prior version, see parent volume.

#### Advisory Committee's Comment on December 31, 1975 Amendment

This amendment brings the rule into line with the Federal practice. Paragraphs (e) and (f) of the Federal rules have no application to the Montana practice.

#### Appellate Review

An appellate court will reverse a trial court judge, who has refused to invoke the sanctions of this section, only when his judgment may materially affect the substantial rights of the parties and allow a possible miscarriage of justice. Wolfe

#### Judge's Discretion

It was not an abuse of discretion for trial judge to allow witness for oil refinery to testify as to condition of ground about railroad tracks where plaintiff-switchman crushed his hand beneath wheel of oil tank car when he allegedly slipped in oil or grease on concrete walkway of refinery in trying to mount the train, even though railroad had not included witness' name in its answer to plaintiff's interrogatories, since witness was the oil refinery's and plaintiff, knowing oil refinery had been joined as a third-party defendant, had failed to seek disclosure from it, or a pretrial conference, and had allowed other witnesses to testify to the same matter at trial. Wolfe v. Northern Pacific Ry. Co., 147 M 29, 409 P 2d 528.

### (b) FAILURE TO COMPLY WITH ORDER.

(1) Sanctions by court in district where deposition is taken. If a deponent fails to be sworn or to answer a question after being directed

to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by court in which action is pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35 (a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

**History:** En. Sec. 37, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

#### **Amendments**

The amendment of December 31, 1975, completely rewrote the rule to coincide with Rule 37 FRCP. For prior version, see parent volume.

#### **Advisory Committee's Comment on December 31, 1975 Amendment**

This amendment brings the rule into line with the Federal practice. Paragraphs (e) and (f) of the Federal rules have no application to the Montana practice.

(c) **EXPENSES ON FAILURE TO ADMIT.** If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless



it finds that (1) the request was held objectionable pursuant to Rule 36 (a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

**History:** En. Sec. 37, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

#### Amendments

The amendment of December 31, 1975, completely rewrote the rule to coincide with Rule 37 FRCP. For prior version, see parent volume.

#### Advisory Committee's Comment on December 31, 1975 Amendment

This amendment brings the rule into line with the Federal practice. Paragraphs (e) and (f) of the Federal rules have no application to the Montana practice.

(d) **FAILURE OF PARTY TO ATTEND AT OWN DEPOSITION OR SERVE ANSWERS TO INTERROGATORIES OR RESPOND TO REQUEST FOR INSPECTION.** If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b) (6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

**History:** En. Sec. 37, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

#### Amendments

The amendment of December 31, 1975, completely rewrote this rule to coincide with Rule 37 FRCP. For prior version, see parent volume.

#### Advisory Committee's Comment on December 31, 1975 Amendment

This amendment brings the rule into line with the Federal practice. Paragraphs (e) and (f) of the Federal rules have no application to the Montana practice.

## VI. TRIALS

Rule 41. Dismissal of actions.

43. Evidence.

44. Proof of official record.

44.1. Determination of foreign law.

45. Subpoena.

46. Exceptions unnecessary.

47. Jurors.

50. Motion for a directed verdict and for judgment notwithstanding the verdict.

52. Findings by the court.

**Rule 38. Jury trial of right.****(a) RIGHT RESERVED.****Declaratory Judgment**

A party has a right to a jury trial on demand where the suit is for a declara-

tory judgment and there are triable issues of fact. *Mahan v. Hardland*, 147 M 78, 410 P 2d 156.

**Rule 39. Trial by jury or by the court.****(c) ADVISORY JURY AND TRIAL BY CONSENT.****New Trial**

In an equity action for specific performance tried before an advisory jury, where the court granted defendant's mo-

tion for a new trial, the court was not required to order that the new trial be by jury as had the original proceedings. *Waite v. Waite*, 143 M 248, 389 P 2d 181.

**Rule 41. Dismissal of actions.****(a) VOLUNTARY DISMISSAL—EFFECT THEREOF.****Appeal from Dismissal**

Order granting motion to dismiss is an appealable order, but the right to appeal is lost after the deadline passes, and cannot be revived seventeen months later by a motion for appeal and reinstatement of the case. *Beach v. Destination Enterprises, Inc.*, — M —, 526 P 2d 1382.

erly granted where counterclaiming defendant did not object to dismissal, where trial was in fact had on defendant's counterclaim and where defendant in fact obtained judgment against plaintiff on counterclaim. *Ratcliff v. Murphy*, 150 M 31, 430 P 2d 627.

**Dismissal As Affecting Counterclaim**

Motion to dismiss complaint was prop-

**References**

*Vennes v. Nollmeyer*, 144 M 43, 394 P 2d 178.

**(b) INVOLUNTARY DISMISSAL—EFFECT THEREOF.** For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or failure to join a party under Rule 19, operates as an adjudication upon the merits.

**History:** En. Sec. 41, Ch. 13, L. 1961; amd. Sec. 1, Ch. 111, L. 1963; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

tuted "failure to join a party under Rule 19" for "for lack of an indispensable party."

**Amendments**

The amendment of September 29, 1967 inserted "in an action tried by the court without a jury" before "has completed" in the second sentence and deleted the same phrase from the beginning of the third sentence; and, in the last sentence, substi-

**Advisory Committee's Note to September 29, 1967 Amendment**

Source: Fed. R. Civ. P. 41(b), as amended 1963 and 1966.

Explanation of change: Under the prior text of the second sentence of this subdivision [Rule 41(b)], the motion for dismissal at the close of the plaintiff's evi-

dence may be made in a case tried to a jury as well as in a case tried without a jury. But when made in a jury-tried case, this motion overlaps the motion for a directed verdict under Rule 50(a), which is also available in the same situation. This overlap has caused confusion. Accordingly it is amended to provide that the motion for dismissal at the close of the plaintiff's evidence shall apply only to nonjury cases (including cases tried with an advisory jury). Hereafter the correct motion in jury-tried cases would be a motion for a directed verdict. This amendment involves no change of substance.

The first sentence of Rule 41(b), providing for dismissal for failure to prosecute or to comply with the Rules or any order of court, and the general provisions of the last sentence remain applicable in jury as well as nonjury cases.

This amendment also changes the last sentence of this subdivision to accord with the amendment to Rule 19.

#### Failure To Prosecute

Trial court abused discretion in dismissing action for failure of plaintiff to prosecute where case was returned by supreme court to lower court for new trial but trial court failed to set it for trial at next jury term as per order of supreme court. *Jangula v. United States Rubber Co.*, 149 M 241, 425 P 2d 319.

Case was properly dismissed for failure of plaintiff to prosecute where nothing was done to bring it to trial for over twelve years despite fact that defendant had shown no injury by delay, that attor-

neys had agreed to get together and try to work out agreement and that defendant had filed cross-complaint which was defensive in character. *Cremer v. Braaten*, 151 M 18, 438 P 2d 553.

#### Failure To State a Claim

This rule has no application to a motion to dismiss for failure to state a claim under Rule 12(b). *Rambur v. Diehl Lumber Co.*, 144 M 84, 394 P 2d 745, 750.

#### Findings and Conclusions

Lower court ruling that "no cause of action or claim exists or has been proven" and "the same is hereby dismissed" was sufficient compliance with the Rules despite plaintiff's contention that findings of fact and conclusions of law did not meet requirements of Rules. *Mondakota Gas Co. v. Becker*, 151 M 513, 445 P 2d 745.

#### Insufficiency of Evidence

District court erred in not granting defendant's motions for dismissal and directed verdict where evidence, viewed in light most favorable to plaintiff, did not support verdict for him. *MacDonald v. Protestant Episcopal Church*, 150 M 332, 435 P 2d 369.

Defendant was entitled to have motion for involuntary dismissal granted where plaintiff wholly failed to establish prima facie case of negligence. *Knowlton v. Sandaker*, 150 M 438, 436 P 2d 98.

#### References

*Whitcraft v. Semenza*, 145 M 97, 399 P 2d 757.

### DECISIONS UNDER FORMER LAW

#### Insufficient Evidence

Where plaintiff's property was damaged by the dropping of fire retardant from airplanes and at the trial he failed to show the lack of proper care under the circumstances, the trial court properly nonsuited plaintiff upon defendant's motion. *Stocking v. Johnson Flying Service*, 143 M 61, 387 P 2d 312.

No cause should be withdrawn from the jury unless evidence is susceptible of but one construction by reasonable men and that in favor of the defendant, or the evidence is in such condition that if the jury

returned a verdict in favor of the plaintiff, it would be the court's duty to set it aside. *Jackson v. William Dingwall Co.*, 145 M 127, 399 P 2d 236.

Trial court properly granted directed verdict for defendant, employer and ranch foreman, where plaintiff, a ranch hand, was injured while riding atop a bobsled loaded with hay, since plaintiff failed to make out a prima facie case that tipping of bobsled was due to negligence. *Jackson v. William Dingwall Co.*, 145 M 127, 399 P 2d 236.

(e) **FAILURE TO SERVE SUMMONS.** No action heretofore or hereafter commenced shall be further prosecuted as to any defendant who has not appeared in the action or been served in the action as herein provided within three years after the action has been commenced, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced, on its own motion, or on the motion of any party interested therein, whether named in the complaint as a party or



not, unless summons shall have been issued within one year, or unless summons issued within one year shall have been served and return made and filed with the clerk of the court within three years after the commencement of said action, or unless appearance has been made by the defendant or defendants therein within said three years. When more than one defendant has been named in an action, the action may within the discretion of the trial court be further prosecuted against any defendant who has appeared within three years, or upon whom summons which has been issued within one year has been served and return made and filed with the clerk within three years as herein required.

**History:** En. Sec. 1, Ch. 111, L. 1963; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965.

#### **Amendment**

The 1965 amendment inserted "as to any defendant who has not appeared in the action or been served in the action as herein provided within three years after the action has been commenced" in the first part of the first sentence; substituted "unless summons shall have been issued within one year, or unless summons issued within one year shall have been served and return made and filed with the clerk of the court" for "summons shall have been served and return made" in the latter part of the first sentence; and added the second sentence.

#### **Commission Note to 1965 Amendment**

This clarifies and brings together the laches provisions with respect to issuance and service of summons. At present Rules 4 C(1), 41(e), Section 93-3002, R. C. M. 1947, and Rule 12(b) all need to be referred to. This amendment incorporates the laches provision of Section 93-4705 (7), R. C. M. 1947, which was repealed by Chapter 13 of the 1961 Session Laws.

This amendment renders Section 93-3002, R. C. M. 1947, unnecessary, and that section superseded and added to Tables B and C.

#### **How Raised**

Where return was made more than three years after commencement of action, this subsection, since it is not a statute of limitations, could be raised by motion under Rule 12(b), rather than pleaded as an affirmative defense. *Whitcraft v. Semenza*, 145 M 94, 399 P 2d 757.

#### **Pending Actions**

Even though there was a lapse of a year between repeal of former section 93-4705, R. C. M. 1947, and adoption of this rule, which is identical, application of this rule to a pending action in which return was made more than three years after commencement of the action was proper, since not only was a reasonable time allowed before the effective date of the change, but the information was widely distributed. *Whitcraft v. Semenza*, 145 M 94, 399 P 2d 757.

#### **Probate Matters**

Rule does not apply to service of summons in suit on rejected claim in probate which is governed exclusively by statute providing for contesting rejected claims in probate. *Werning v. McFarland*, 149 M 137, 423 P 2d 851.

#### **Renewal of Claim**

A judgment is not *res judicata* unless it is on the merits, so that a dismissal under this rule, since it is not a statute of limitations, does not constitute a bar to another suit on the same claim. *Whitcraft v. Semenza*, 145 M 94, 399 P 2d 757.

#### **Statute of Limitations**

Dismissal under this rule for failure to have summons issued within one year after commencement of the action is a dismissal for neglect to prosecute within the meaning of section 93-2708: that section does not operate to permit the commencement of a new action after expiration of the statute of limitations. *State ex rel. Equity Supply Co. v. District Court*, 159 M 34, 494 P 2d 911.

### **DECISIONS UNDER FORMER LAW**

#### **Quashing Summons**

District court exceeded its jurisdiction in denying motion to quash summons and dismiss action where the summons had not been served and returned within the

three years required by this rule prior to 1965 amendment. *State ex rel. Belwin, Inc. v. Davison*, 148 M 345, 420 P 2d 842, 844.

**Rule 42. Consolidation—Separate trials.****(a) CONSOLIDATION.****"Pending Before the Court"**

Cases as to which time for appeal had passed were not "pending before the court" so as to make them amenable to consolidation with cases not yet reduced

to judgment even though amount of insolvent warehouseman's bond might not be sufficient to satisfy all claims in full. *Peavey Company v. Agri-Services, Inc.*, — M —, 517 P 2d 718.

**(b) SEPARATE TRIALS.****Abuse of Discretion**

In wrongful death and survival action trial court abused its discretion by denying motion for separate trial on issue of validity of release where separate trials would result in convenience and economy of time to parties, witnesses and court and since possible finding that release was valid would end matter and trial of complicated issue of wrongful death and survival would be avoided. *State ex rel. Northern Pacific R. Co. v. District Court of Sixteenth Judicial District in and for County of Rosebud*, 155 M 91, 467 P 2d 145.

**Discretion of Court**

Grant of separate trial under this section on counterclaims on matters unrelated to plaintiff's complaint was within discretion of district judge and was not disturbed since no clear abuse of discretion was apparent. *State ex rel. Rooks v. District Court*, 153 M 189, 456 P 2d 308.

**Insurance Coverage**

Federal court dismissed action for declaratory judgment declaring obligations of casualty insurance company under an automobile insurance policy, which allegedly had been canceled prior to the time of the accident involving the automobile of the insured who was being sued

for injuries resulting from the accident in the state court, since the issues, which did not involve federal law, could be solved in the state court wherein third-party complaint under M. R. Civ. P., Rule 14(a), had been filed by the insured against the insurer in which insured sought to hold the insurer to the terms of the policy, where state court could dispose of the coverage problem first under this rule. *Western Casualty & Surety Co. v. Pinson*, 255 F Supp 624, 625.

**Permissive Joinder**

Since this section allows for separate trials, practically, it seems desirable to give the broadest possible reading to the permissive language of Rule 20. *Wheat v. Safeway Stores, Inc.*, 146 M 105, 404 P 2d 317.

**Successor Judge**

Disqualification of district judge did not render res judicata or the law of the case his previous ruling denying severance of claims against different defendants; successor judge could reconsider and grant severance. *State ex rel. Stenberg v. Nelson*, 157 M 310, 486 P 2d 870.

**References**

*Bozeman Deaconess Foundation v. Cowgill*, 143 M 98, 387 P 2d 435.

**Rule 43. Evidence.****(b) SCOPE OF EXAMINATION AND CROSS-EXAMINATION.****Agent of Opposing Party**

District court properly permitted plaintiff to examine driver for company under contract with defendant as an adverse witness under this section, for the purpose of establishing the driver's negligence to be imputed to the defendant, because under the applicable Federal Employer's Liability Act the driver was an agent of the defendant. *Salvail v. Great Northern Ry. Co.*, 156 M 12, 473 P 2d 549.

**Plaintiff Called as Defense Witness**

Where plaintiff appeared as her own only witness and was not cross-examined by the defendant who then called her as a defense witness, the defense was bound

by her testimony even though it came after the plaintiff herself had rested her case. *Close v. Rueggsegger's Estate*, 143 M 32, 386 P 2d 739.

**Statutory Proceedings**

In statutory action brought to remove administrator for misappropriation of funds of estate, administrator could be examined as adverse witness since Rule 81, excluding statutory proceedings from Rules of Civil Procedure to extent that statutory proceedings are contrary to Rules, does not bar examination of administrator as adverse witness. In re *Estate & Guardianship of Wyman*, 149 M 525, 429 P 2d 629.



## (e) EVIDENCE ON MOTIONS.

**Summary Judgments**

Oral testimony may be heard on mo-

tions for summary judgment. *Daniels v. Paddock*, 145 M 207, 399 P 2d 740.

(f) **INTERPRETERS.** The court may appoint an interpreter of its own selection and may fix his reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.

**History:** En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

**Advisory Committee's Note**

Source: Fed. R. Civ. P. 43(f), as amended 1966.

**Explanation of change:** This new subdivision authorizes the court to appoint interpreters (including interpreters for the deaf), to provide for their compensation, and to tax the compensation as costs.

**Rule 44. Proof of official record.**

## (a) AUTHENTICATION.

(1) **Domestic.** An official record kept within the United States, or any state, district, commonwealth, territory, or insular possession thereof, or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office.

(2) **Foreign.** A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice-consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification.

**History:** En. Sec. 44, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

**Amendments**

The amendment of September 29, 1967 rewrote all but the first sentence of this rule and divided it into two clauses; in



the first sentence, the amendment inserted "kept within the United States \* \* \* Ryukyu Islands" and substituted "by" for "with" before "a certificate that."

**Advisory Committee's Note to September 29, 1967 Amendment**

Source: Fed. R. Civ. P. 44, as amended 1966.

Explanation of change: The new provisions of subdivision (a)(1) on proof of official records kept within the United States are similar in substance to those heretofore appearing in Rule 44. There is a more exact description of the geographical areas covered.

Under subdivision (a)(2) foreign official records may be proved as heretofore, by means of official publications thereof. The rest of subdivision (a)(2) aims to provide greater clarity, efficiency, and flexibility in the procedure for authenticating copies of foreign official records. It

is provided that an attested copy may be obtained from any person authorized by the law of the foreign country to make the attestation without regard to whether he is charged with responsibility for maintaining the record or keep it in his custody. The amendment specifically permits use of the chain-certificate method of authentication.

Although the amended rule will generally facilitate proof of foreign official records, it is recognized that in some situations it may be difficult or even impossible to satisfy the basic requirements of the rule. Therefore the final sentence of subdivision (a)(2) provides the court with discretion to admit an attested copy of a record without a final certification, or an attested summary of a record with or without a final certification. Reasonable effort must be made to satisfy the basic requirements.

(b) **LACK OF RECORD.** A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a)(1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a)(2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.

**History:** En. Sec. 44, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

**Amendments**

The amendment of September 29, 1967 rewrote this rule. For text of former rule, see parent volume.

**Advisory Committee's Note to September 29, 1967 Amendment**

Source: Fed. R. Civ. P. 44, as amended 1966.

Explanation of change: Subdivision (b) [Rule 44(b)] is accommodated to the changes made in subdivision (a) [Rule 44(a)].

(c) **OTHER PROOF.** This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law.

**History:** En. Sec. 44, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

**Amendments**

The amendment of September 29, 1967 substituted "authorized by law" for "any applicable statute or by the rules of evidence at common law."

**Rule 44.1. Determination of foreign law.**

A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43. The court's determination shall be treated as a ruling on a question of law.

**History:** En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

**Advisory Committee's Note**

Source: Fed. R. Civ. P. 44.1, as adopted 1966.

Explanation of change: This is new and clears up uncertainty as to whether foreign law must be pleaded. Under this rule the notice need not be given in the pleadings.

The rule affords a procedure for raising and determining an issue of foreign law. It does not require the court to take judicial notice of the foreign law.

The rule appears to be consistent with and complementary to Rule 9(d) and R. C. M. 1947, section 93-501-6.

### Power of Court

Under this section, trial court has power to fashion procedures for determination of whether reciprocity of transfer and reciprocity of inheritance exists between citizens of state and citizens of foreign country. In re Estate of Giurgiu, 155 M 18, 466 P 2d 83, appeal dismissed 399 US 901, 26 L Ed 2d 555, 90 S Ct 2195.

## Rule 45. Subpoena.

### (c) SERVICE.

#### Attorney as Witness

This rule does not distinguish between attorney and the layman; if an attorney would not have attended a hearing except

for a subpoena, he is entitled to his statutory witness fee and mileage. United Bank of Pueblo v. Iverson, — M —, 525 P 2d 21.

### (d) SUBPOENA FOR TAKING DEPOSITIONS; PLACE OF EXAMINATIONS.

(1) Proof of service of a notice to take a deposition as provided in Rules 30(b) and 31(a) constitutes a sufficient authorization for the issuance by the clerk of court where the action is pending, or for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of Rule 26(c) and subdivision (b) of this rule.

The person to whom the subpoena is directed may, within 10 days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than 10 days after service, serve upon the attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection has been made, move upon notice to the deponent for an order at any time before or during the taking of the deposition.

(2) A resident of the state may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court. A non-resident of the state may be required to attend in any county of the state wherein he is served with a subpoena or at any other convenient place as is fixed by order of court.

History: En. Sec. 45, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

#### Amendments

The amendment of December 31, 1975, rewrote the rule to coincide with Rule 45 FRCP. For prior version, see parent volume.

**Rule 46. Exceptions unnecessary.**

Formal exceptions to rulings, orders, or findings of the court are unnecessary; but for all purposes it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take, or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

**History:** En. Sec. 46, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969; amd. Sup. Ct. Ord. 10750-10, Oct. 22, 1971, eff. Jan. 1, 1972.

**Amendments**

The 1969 amendment inserted "Except as provided in Rule 52, with respect to findings by the court" at the beginning of the section.

The 1971 amendment deleted the language inserted by the 1969 amendment

and inserted "or findings" in the first clause of the rule.

**Advisory Committee's Note to May 21, 1969 Amendment**

**Explanation of change:** The attention of the Committee has been invited to considerable confusion existing under the old wording of this rule, of Rule 52, and of Section 93-5305, R. C. M. 1947, which statute is now being superseded. It is thought by rewriting Rule 46 and Rule 52 the existing confusions can be avoided.

**DECISIONS UNDER FORMER LAW****Exceptions to Findings and Conclusions**

Effect of rule providing that formal exceptions are unnecessary but requiring aggrieved party to make objections and grounds therefor known to court, when considered with statute providing that no judgment will be reversed on appeal for defects in findings unless exceptions are made to findings complained of in lower court, is that counsel must point out ex-

ceptions to findings on motions where court is required to make findings of fact and conclusions of law so that trial court may have opportunity to correct them and upon failure to do so, findings become final and judgment will not be reversed. *Stapp v. Nickels*, 150 M 220, 434 P 2d 141, distinguished in 157 M 295, 299, 485 P 2d 703.

**Rule 47. Jurors.**

(b) **MANNER OF SELECTION AND ORDER OF EXAMINATION OF JURORS.** From the entire jury panel, an initial panel of 20 jurors shall be called in the first instance, and before any voir dire examination of the jury shall be had. Examination of all jurors in the initial panel shall be completed by the plaintiff before examination by the defendant. If challenges for cause are allowed, an additional juror shall be called from the entire panel immediately upon the allowance of challenge, and the juror called to replace the juror excused for cause shall take the number of the juror who has been excused, to provide a full initial panel of 20 jurors, whose examination shall be completed before any peremptory challenges are made. When the voir dire examination has been completed, each side shall have four peremptory challenges, and they shall be exercised by the plaintiff first striking one, the defendant then striking one, and so on, until each side has exhausted or waived its right. In event one or more alternate jurors are called, the next jurors remaining in the initial panel, if any, shall be called by the clerk to be the alternate jurors. In event all jurors remaining of original initial panel of 20 jurors, including those substituted for those jurors excused for cause, have been subjected to peremptory challenge, then the clerk shall call ad-



ditional jurors from the remainder of the jury panel to provide alternate jurors who will be subject to challenge as provided by law. In event there is more than one party defendant, and should it appear that each defendant is entitled to peremptory challenges, then the original panel shall be increased to provide four additional jurors for each defendant who is entitled to exercise peremptory challenges. The clerk shall keep a record of the order in which jurors are called, and in event the entire initial panel has not been exhausted by challenges, the court shall excuse sufficient of the last called jurors until a jury of twelve persons and the determined number of alternates shall remain to make up the trial jury.

**History:** En. Sec. 47, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

#### **Amendments**

The amendment of May 21, 1969 inserted "and the juror called \* \* \* who has been excused" in the second sentence.

#### **Advisory Committee's Note to May 21, 1969 Amendment**

Explanation of change: In some judicial districts the practice is that the replacement juror takes a new number at the bottom of the list, in others the replacement takes the same number as the juror excused. This amendment expressly adopts the latter and makes the practice uniform throughout the state.

### **(c) ALTERNATE JURORS.**

#### **Alternate Juror**

It was reversible error for alternate juror to be in the jury room for about fifteen minutes during deliberations and to have lunch with the jury; court is not

at liberty to make exceptions based on length of time, actual harm, or fact that person involved was a sworn alternate juror. *State Highway Commission v. Dunks*, — M —, 531 P 2d 1316.

**Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict.**

**(a) MOTION FOR DIRECTED VERDICT—WHEN MADE, EFFECT.** A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

**History:** En. Sec. 50, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### **Amendments**

The amendment of September 29, 1967 added the last sentence, giving effect to an order for directed verdict even without the jury's assent.

Explanation of change: The practice, after the court has granted a motion for a directed verdict, of requiring the jury to express assent to a verdict they did not reach by their own deliberations serves no useful purpose and may give offense to members of the jury.

#### **Breach of Employment Contract**

Statement by office secretary of local union to its executive officer that latter had been removed from office was not the type of information which would lead a prudent person to believe she had

#### **Advisory Committee's Note to September, 29, 1967 Amendment**

Source: Fed. R. Civ. P. 50, as amended 1963.

been discharged, and local union was entitled to directed verdict in officer's action for breach of employment contract where there was no evidence that officer had in fact been discharged, she was not subject to discharge at will and she had never talked to anyone in authority to confirm her discharge. *Hannifin v. Retail Clerks International Assn.*, — M —, 511 P 2d 982.

#### **Circumstances Under Which Motion Should Be Granted**

Denial of motion for directed verdict, by lessor of destroyed building in suit by lessee claiming that premises were repairable, was cause for reversal where, viewing evidence most favorable to plaintiff lessee and considering as proven everything which evidence tended to prove, reasonable man could come to no other conclusion but that building involved was destroyed. *Solich v. Hale*, 150 M 358, 435 P 2d 883.

#### **Directed Verdict on Issue of Liability**

Although rodeo company was the owner of dangerous animals, it was not an insurer, and trial court correctly denied directed verdict against rodeo on issue of liability where show was produced in facilities erected and maintained by county. *Ross v. Golden State Rodeo Co.*, — M —, 530 P 2d 1166.

#### **Failure of Proof**

In action for breach of contract, an ex-

hibit of 123 pages of inaccurate information about all the deliveries made by the plaintiff was insufficient proof without supporting testimony, and directed verdict for defendant was proper. *LaVelle v. Kenneally*, — M —, 529 P 2d 788.

#### **Granting Motion at End of Plaintiff's Case**

Court erred in granting plaintiff's motion for directed verdict before defendant had opportunity to present his case, where defendant was precluded from offering evidence to rebut presumption of negligence raised by plaintiff's case in chief based on doctrine of *res ipsa loquitur*, notwithstanding fact that plaintiff had examined all witnesses to accident during his case in chief. *Baker v. Rental Service Co.*, 150 M 166, 432 P 2d 624.

#### **Refusal to Grant Motion**

Party who alleges error in refusing his motion under this section had burden of showing that error was in fact committed. *Fuchs v. Huether*, 154 M 11, 459 P 2d 689.

#### **Waiver of Jury Trial**

Where both parties in jury trial moved for directed verdict at the close of evidence, trial court improperly granted plaintiff's motion, since there were factual issues for jury to decide and since, under this section, a motion for a directed verdict is not a waiver of trial by jury. *Borgmann v. Diehl*, 155 M 458, 473 P 2d 529.

(b) **MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.** Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after service of notice of entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

Motions provided by this subdivision shall be heard and determined within the times provided by Rule 59 for the hearing and determination of motions for new trial.



**History:** En. Sec. 50, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Sept. 7, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

#### **Amendments**

The amendment of September 7, 1965 added the second paragraph.

The amendment of September 29, 1967 substituted the present heading for "Reservation of decision on motion" and, in the second sentence of the first paragraph, substituted "Not later than 10 \* \* \* judgment" for "Within 10 days after the reception of a verdict."

The amendment of May 21, 1969, in the second paragraph, substituted "Rule 59 \* \* \* for new trial" for "Section 93-5606 of the 1947 Revised Codes of Montana in the case of motions for new trial."

#### **Advisory Committee's Note to September 29, 1967 Amendment**

Source: Fed. R. Civ. P. 50, as amended 1963.

Explanation of change: A motion for judgment notwithstanding the verdict will not lie unless it was preceded by a motion for a directed verdict made at the close of all the evidence.

This departs from the federal amend-

ment in providing that the time limit for making a motion for judgment n.o.v. is 10 days after service of notice of entry of judgment, rather than 10 days after entry of judgment as provided in the federal amendment. This is consistent with the provisions of Rules 59(b) (time for motion for a new trial) and 52(b) (time for motion to amend findings by the court).

#### **Advisory Committee's Note to May 21, 1969 Amendment**

Explanation of change: A housekeeping change to conform with superseding section 93-5606, R. C. M. 1947, by the amendment of Rule 59.

#### **Application of Rule on Review**

Alternatives for disposition of a motion under this section available to a trial court are equally available to a reviewing appellate court; therefore, where appeal was, *inter alia*, from denial of motion under this section, appellate court in reversing trial court could itself order a new trial. *Erickson v. Perrett*, — M —, 545 P 2d 1074.

#### **Refusal to Grant Motion**

Party alleging error in refusing his motion under this section had burden of showing that error was in fact committed. *Fuchs v. Huether*, 154 M 11, 459 P 2d 689.

### **(c) MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT—CONDITIONAL RULINGS ON GRANT OF MOTION.**

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the supreme court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the respondent on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the supreme court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after service of notice of entry of the judgment notwithstanding the verdict.

**History:** En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### **Advisory Committee's Note**

Source: Fed. R. Civ. P. 50, as amended 1963.

Explanation of change: The procedure

where a party joins a motion for a new trial with his motion for judgment n.o.v., or prays for a new trial in the alternative has often been misunderstood. This amendment summarizes the practice. It does not alter the effects of a jury verdict or the scope of appellate review.



(d) **MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT—DENIAL OF MOTION.** If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as respondent, assert grounds entitling him to a new trial in the event the supreme court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the supreme court reverses the judgment, nothing in this rule precludes it from determining that the respondent is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

**History:** En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### **Advisory Committee's Note**

Source: Fed. R. Civ. P. 50, as amended 1963.

Explanation of change: This subdivision does not attempt a regulation of all aspects of the procedure where the motion

for judgment n.o.v. and any accompanying motion for a new trial are denied, since the problems have not been fully canvassed in the decisions and the procedure is in some respects still in a formative stage. It is, however, designed to give guidance on certain important features of the practice.

### **Rule 51. Instructions to jury—Objection.**

#### **Confused Objection**

Purpose of this rule is to allow a judge an opportunity to correct his own errors, and where objection is not clearly raised due to efforts of attorneys to strike jury instructions regarding highest and lowest estimates of just compensation, such objection will not be heard on appeal. *State Highway Commission v. Beldon*, — M —, 531 P 2d 1324.

#### **Instruction in Ordinary Care**

In action for wrongful death of boy who was killed by brahma bull at rodeo, jury instructions on ordinary care of a reasonable person were sufficient where there was no proof of negligence against the rodeo company. *Ross v. Golden State Rodeo Co.*, — M —, 530 P 2d 1166.

#### **Instructions on Nonapplicable Law**

In action for negligence in making left turn in no passing zone, it was error to instruct jury on inapplicable laws prohibiting anyone from driving on left side of road, especially when the instruction was combined with instruction that statutory violations are negligence as a matter of law. *Rude v. Neal*, — M —, 530 P 2d 428.

#### **Preserving for Review**

Appellant who objected to jury instruction but did not specifically object to an interchange of words therein did not preserve review of the interchange. *Cross v. Trethewey*, 155 M 337, 471 P 2d 538.

Objections to jury instructions made at trial on grounds of insufficient evidence to support the instructions but not pointing out how the evidence was insufficient,

did not preserve the question for review on appeal. *Salvail v. Great Northern Ry. Co.*, 156 M 12, 473 P 2d 549.

Plaintiff's contention on appeal which is clearly an objection to instruction in trial court will not be considered by supreme court where plaintiff failed to object to instruction in trial court. *Roberts Realty Corp. v. City of Great Falls*, 160 M 144, 500 P 2d 956.

#### **Refusal to Give Instructions**

Denial of offered instructions which were adaptable to defendant's theory of the case was prejudicial error where such denial deprived him of a possible defense of assumption of risk. *Wollan v. Lord*, 142 M 498, 385 P 2d 102, distinguished in 145 M 486, 488, 402 P 2d 41.

It is not error for the trial judge to refuse to give specific instruction where the subject in question has been adequately covered by other instructions. *Holland v. Konda*, 142 M 536, 385 P 2d 272, 6 ALR 3d 824.

Contention that trial court erred by not instructing jury on defendant's duties toward trespasser was without merit where such instruction was not offered by plaintiff as required by this section. *Gundersen v. Brewster*, 154 M 405, 466 P 2d 589.

Refusal of instruction on reckless misconduct and the defense of contributory negligence was error in negligence action where both drivers were driving late at night without headlights, and reasonable men could reach opposing conclusions as to whether or not defendant was willfully and wantonly negligent. *Mallory v. Cloud*, — M —, 535 P 2d 1270.

**Rule 52. Findings by the court.**

(a) **EFFECT.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

**History:** En. Sec. 52, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969; amd. Sup. Ct. Ord. 10750-10, Oct. 22, 1971, eff. Jan. 1, 1972.

**Amendments**

The 1969 amendment rewrote the first part of the rule and made it into a separate paragraph requiring that findings be reduced to writing and served on the parties.

The 1971 amendment restored the language as it stood prior to the 1969 amendment, with minor changes; and inserted new provisions as the second, third and fifth sentences.

**Advisory Committee's Note to May 21, 1969 Amendment**

**Explanation of change:** Sections 93-5302, 93-5305, 93-5306, and 93-5307, R. C. M. 1947, are hereby superseded. The purpose of changing Rule 52, along with the change made in Rule 46, is twofold. It should eliminate the confusions that now exist with respect to the lack of necessity of making exceptions to the rulings and orders of the court, as distinct from the requirement that appropriate exceptions be made to findings of the court on trial of fact issues. In addition, it incorporates in this one rule the existing practice and procedure with respect to exceptions to findings of the court, and eliminates the necessity of researching for, and referring

separately to, controlling statutes, case decisions, and rules, and then trying to correlate all three.

**Appellate Review of Findings**

Findings of fact made by trial court will not be disturbed where they are supported by preponderance of evidence. *Western Foundry, Inc. v. Matelich*, 150 M 228, 433 P 2d 789.

**Sufficiency of Findings**

Lower court ruling that "no cause of action or claim exists or has been proven" and "the same is hereby dismissed" was sufficient compliance with Rules despite plaintiff's contention that findings of fact and conclusions of law did not meet requirements of Rules. *Mondakota Gas Co. v. Becker*, 151 M 513, 445 P 2d 745.

**Summary Judgment**

Even though findings are not required in granting summary judgment, if findings are made that form the basis for judgment and if the evidence does not support the findings, the judgment will be reversed. *Upper Missouri G & T Electric Cooperative v. McCone Electric Co-op., Inc.*, 157 M 239, 484 P 2d 741.

**References**

*Stokes v. Delaney & Sons, Inc.*, 143 M 516, 391 P 2d 698; *Tolson v. Tolson*, 145 M 87, 399 P 2d 754.

(b) **AMENDMENT.** Upon motion of a party made not later than 10 days after notice of entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the find-



ings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

**History:** En. Sec. 52, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Aug. 1, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750, Sept. 7, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-7, May 21, 1969, eff. July 1, 1969; amd. Sup. Ct. Ord. 10750-10, Oct. 22, 1971, eff. Jan. 1, 1972.

#### Amendments

The amendment of August 1, 1965 inserted "service of notice of" before "entry of judgment" in the first sentence.

The amendment of September 7, 1965 added a second paragraph providing that motions to amend should be heard and determined within the time for determining motions for new trial as provided by section 93-5606.

The 1969 amendment rewrote the rule to require that parties file written requests for findings, to remove as ground for appeal the want of findings not requested by the party, and to provide for exceptions to findings and the determination thereof.

The 1971 amendment restored the language as it stood prior to the 1965 amendments; inserted "notice of" before "entry of judgment" in the first sentence; and added new language as the third sentence.

#### Commission Note to August 1, 1965 Amendment

Under Rule 77(d) the prevailing party has 10 days after the entry of judgment to give the unsuccessful parties notice of such entry. The change in 52(b) is an adjustment to this provision, and is designed to meet the possibility that the prevailing

party is the only party that knows of the entry of the judgment and waits 10 days before giving the unsuccessful party notice of such entry. The provision is similar to that found in Rule 59(b) and (e).

#### Advisory Committee's Note to May 21, 1969 Amendment

See Advisory Committee's Note under Rule 52(a).

#### Amendment of Findings and Judgment

A motion to alter, amend, and supplement findings of fact, conclusions of law and the judgment combined with a motion for a new trial, filed on September 28, 1965, was a motion contemplated by this rule and Rule 59(e) and was not governed by the time limits of section 93-5606. *State ex rel. Rozan v. District Court of Sixteenth Judicial Dist., 147 M 532, 416 P 2d 19, 21.*

#### New Trial Unnecessary

Where trial court's decision was not supported by findings of fact, proper procedure would have been to proceed under this rule providing that court may amend its findings or make additional findings and amend its decision accordingly. *Higdem v. Whitham, — M —, 536 P 2d 1185.*

#### References

*Sztaba v. Great Northern Ry. Co., 147 M 185, 411 P 2d 379.*

## DECISIONS UNDER FORMER LAW

#### Exceptions Required for Reversal

Under former statute which was superseded by this Rule, objections to findings of district court could not be raised for the first time upon appeal. *Rozan v. Rosen, 150 M 121, 431 P 2d 870.*

Mandate of former statute (superseded by this Rule) that findings of district court would not be reviewed on appeal unless exceptions were taken was not changed by fact that counsel on appeal was not same counsel who tried case in district court. *Olsen v. United Benefit Life Ins. Co., 150 M 147, 432 P 2d 381.*

Rule providing that formal exceptions are unnecessary if aggrieved party makes his objections and grounds therefor known to court and former statute (superseded by this Rule) providing that no judgment will be reversed on appeal for defects in findings unless exceptions are made in

lower court were required to be read together with result that it was necessary for counsel to point out exceptions to findings so that trial court might have opportunity to correct them and failure to do so meant findings became final and judgment would not be reversed. *Stapp v. Nickels, 150 M 220, 434 P 2d 141.*

Under former statute, failure to except to findings of trial court made them final and judgment would not be reversed. *Keller v. Martin, 153 M 9, 452 P 2d 422.*

Under former statute, exceptions had to be made to trial court's defects in findings to give trial court opportunity to correct them or they would become final and not subject to appeal. In re *Estate of Dolezilek, 156 M 224, 478 P 2d 278.*

Prior to 1971 amendment, no judgment would be reversed on appeal for defects in findings unless exceptions had been



made in district court. *State ex rel. Bennett v. Dowdall*, 157 M 11, 482 P 2d 572.

Prior to 1971 amendment, failure to except to findings of district court was fatal to appeal. *Sorenson v. Lynch*, 157 M 116, 483 P 2d 907.

Prior to the 1971 amendment dismissal for failure to except to findings is the unavoidable result only in cases where the findings control, and in those instances they cannot be questioned on appeal; however, where the findings do not control, appellants' failure to file exceptions

does not require dismissal. *Kretzschmar v. Bickerstaff*, 158 M 178, 489 P 2d 1285.

Prior to 1971 amendment, failure to file exceptions to court's finding within the time prescribed by this rule did not preclude appeal where party called attention of the court to the alleged errors in the findings by way of a motion to amend the judgment, coupled with a motion for new trial, which was timely served and filed. *Cope v. Cope*, 158 M 388, 493 P 2d 336.

### (c) Repealed.

#### Compiler's Notes

Supreme Court Order No. 10750-9, dated May 21, 1969, created a new Rule 52 (c) requiring statement of conclusions

of law and entry of judgment. Supreme Court Order No. 10750-10, dated October 22, 1971, effectively repealed Rule 52 (c) by omitting it from Rule 52 as amended.

### Rule 53. Masters.

#### (e) REPORT.

##### Hearing on Report

No hearing is necessary when no objections are made to report by parties after being notified by clerk that special

master has filed his report. *State ex rel. Ross v. District Court, Fourth Judicial District*, 150 M 233, 433 P 2d 778.

## VII. JUDGMENT

### Rule 55. Default.

#### 56. Summary judgment.

#### 59. New trials—Amendment of judgments.

#### 60. Relief from judgment or order.

### Rule 54. Judgments—Costs.

#### (b) JUDGMENT UPON MULTIPLE CLAIMS OR INVOLVING MULTIPLE PARTIES.

##### Amendment To Include Codefendant

Case would be remanded to district court for purpose of amending, by incorporating appropriate terms, judgment which omitted to name defaulting codefendant who was jointly and severally liable on obligation. *White v. Nollmeyer*, 151 M 387, 443 P 2d 873.

unconditional guarantors of a note and to foreclose mortgage securing the note, the holder of the note could properly proceed at its option against either security in the same action. *Bozeman Deaconess Foundation v. Cowgill*, 143 M 98, 387 P 2d 435.

##### Separate Claims on Note and Mortgage Upon default in an action against the

##### References

*State ex rel. Kober and Kyriss v. District Court*, 147 M 116, 410 P 2d 945.

### (c) DEMAND FOR JUDGMENT.

#### Divorce Proceedings

Where proper notice of hearing on application for judgment of divorce was given defendant in accordance with M. R. Civ. P., Rule 55(b) and no relief different from that demanded in the complaint was granted in violation of this rule, an appeal on those grounds was dismissed by supreme court upon its own motion where no application to set aside default or judgment was made under Rule

60(b). *Sowerwine v. Sowerwine*, 148 M 195, 418 P 2d 859, 861.

Where pleadings of both parties in divorce proceedings showed that they expected the court to make orders relative to the property, the court had authority to vest all the property in the husband and order alimony paid where justified by the facts, even though neither party had asked for that specific disposition. *Libra v. Libra*, 157 M 252, 484 P 2d 748.

(d) COSTS.

**Costs Not Allowed**

Section 93-8618 particularly enumerates allowable costs under this rule; where cost of taking plaintiff's deposition was made merely for the convenience of defendant's counsel, defendant cannot include such cost in his bill of costs because deposition was for his benefit; deposition was never filed with the district court and plaintiff's counsel did not have any practical means of securing a copy. *Johnson v. Furgeson*, 158 M 170, 489 P 2d 1032.

**Rule 55. Default.**

(a) ENTRY.

**Answer Filed after Entry by Clerk**

Plaintiff was entitled to judgment by default where defendants filed answer after entry of default by clerk and receipt of notice of hearing on motion for default, but before actual hearing on the motion, since entry of default by clerk requires no

notice to party in default, answer was filed after defendants had received notice of motion for default and defendants failed to move to set aside entry of default for "good cause shown" as they were entitled to do under rules. *Sealey v. Majerus*, 149 M 268, 425 P 2d 70.

(b) JUDGMENT. Judgment by default may be entered as follows:

(1). \* \* \* [Same as parent volume.]

(2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative, or guardian ad litem, who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least three days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the state of Montana.

**History:** En. Sec. 55, Ch. 13, L. 1961; amd. Ord. Sup. Ct. June 1, 1964, eff. July 1, 1964.

"good cause shown" as they were entitled to do under rules. *Sealey v. Majerus*, 149 M 268, 425 P 2d 70.

**Amendment**

The 1964 amendment inserted "an" before "account" in the final sentence of paragraph (2).

**Answer Filed after Entry by Clerk**

Plaintiff was entitled to judgment by default where defendants filed answer after entry of default by clerk and receipt of notice of hearing on motion for default, but before actual hearing on the motion, since entry of default by clerk requires no notice to party in default, answer was filed after defendants had received notice of motion for default and defendants failed to move to set aside entry of default for

**Clerk's Error**

Entry of default judgment by clerk of court without requiring affidavit from plaintiff of amount due and owing rendered the judgment voidable but not void. *Interstate Counseling Service v. Emeline*, 144 M 409, 396 P 2d 727, 728. (Dissenting opinion, 144 M 409, 396 P 2d 727, 729.)

Motion to set aside default judgment because of plaintiff's failure to file affidavit of amount due and owing when it requested entry of default judgment was properly denied where defendant permitted judgment to be satisfied from her property, and no reason to avoid the

voidable judgment had been presented. *Interstate Counseling Service v. Emeline*, 144 M 409, 396 P 2d 727, 728. (Dissenting opinion, 144 M 409, 396 P 2d 727, 729.)

Under Rule 61 omission of clerk of court to require affidavit of amount due under this rule before entry of default judgment in favor of plaintiff is not fatal unless refusal to take action with respect to the omission appears to the court inconsistent with substantial justice. *Interstate Counseling Service v. Emeline*, 144 M 409, 396 P 2d 727, 728. (Dissenting opinion, 144 M 409, 396 P 2d 727, 729.)

### Divorce Proceedings

Where proper notice of hearing on application for judgment of divorce was given defendant in accordance with this rule and no relief different from that demanded in the complaint was granted in violation of M. R. Civ. P., Rule 54(c), an appeal on those grounds was dismissed by the supreme court on its own motion where no application to set aside the default or judgment was made under Rule 60(b). *Sowerwine v. Sowerwine*, 148 M 195, 418 P 2d 859, 861.

### Ministerial Function

Clerk of court in entering a default judgment is performing a ministerial function and must follow procedures in detail and absolutely. *Interstate Counseling*

*Service v. Emeline*, 144 M 409, 396 P 2d 727, 728. (Dissenting opinion, 144 M 409, 396 P 2d 727, 729.)

### Nonprejudicial Error

Where record showed that defendant took no action for nearly three months after default judgment had been entered, defendant was not prejudiced by plaintiff's failure to give written notice of application for default judgment as required by paragraph (2) of this rule and district court did not abuse its discretion in denying defendant's motion to vacate the default judgment filed under M. R. Civ. P., Rule 55(c). *Williams v. Superior Homes, Inc.*, 148 M 38, 417 P 2d 92, 94.

### Notice

District court was not deprived of jurisdiction to enter default judgment by plaintiff's failure to give three-day notice required by subdivision (2) of this rule where defendant had taken no action from the time of the entry of the default judgment until his death, a period of approximately thirteen months, the judgment was attacked for the first time by his executrix after approximately one year and seven months had elapsed, and almost four years had passed when the motion to set aside and vacate judgment was filed. *Sikorski & Sons, Inc. v. Sikorski*, — M —, 512 P 2d 1147.

## (c) DEFAULT—SETTING ASIDE—EXTENSION OF TIME, ETC.

### Answer Filed after Entry by Clerk

Plaintiff was entitled to judgment by default where defendants filed answer after entry of default by clerk and receipt of notice of hearing on motion for default, but before actual hearing on the motion, since entry of default by clerk requires no notice to party in default, answer was filed after defendants had received notice of motion for default and defendants failed to move to set aside entry of default for "good cause shown" as they were entitled to do under rules. *Sealey v. Majerus*, 149 M 268, 425 P 2d 70.

### Discretion of Court

Where record showed that defendant took no action for nearly three months after default judgment had been entered, defendant was not prejudiced by plaintiff's failure to give written notice of application for default judgment as required by M. R. Civ. P., Rule 55(b)(2), and district court did not abuse its discretion in denying defendant's motion to vacate the default judgment filed under this rule. *Williams v. Superior Homes, Inc.*, 148 M 38, 417 P 2d 92, 94.

Denial of defendant's motion to set aside entry of default judgment and granting of plaintiff's motion for entry of default judgments were not an abuse of discretion where defendant's claims that he had not been informed of proceedings against him were countered by fact that he had been represented by counsel at material times and that he was aware of necessity of filing answer within thirty days of denial of his motion to dismiss. *Johnson v. Matelich*, — M —, 517 P 2d 731.

### Failure to Appeal

Defendant's failure to appeal the denial of his motion to set aside default judgment renders the decision *res judicata* and precludes the filing of a second action to litigate the same claim or issues decided by the court. *Kamp Implement Co. v. Amsterdam Lumber, Inc.*, — M —, 533 P 2d 1072.

### Good Cause

Motion to set aside entry of default judgment grounded on failure of clerk to give notice to defendant of entry of



default failed to show good cause since no notice of entry of default by the clerk of the district court is required. *Johnson v. Matelich*, — M —, 517 P 2d 731.

### Voidable Judgments

A default judgment entered prematurely pursuant to this section could not be set

aside under M. R. Civ. P., Rule 60(b)(4), since Rule 60(b)(4) applies to void and not voidable judgments. *Sowerwine v. Sowerwine*, 145 M 81, 399 P 2d 233.

### References

*Kraus v. Treasure Belt Min. Co.*, 146 M 432, 408 P 2d 151.

## DECISIONS UNDER FORMER LAW

### Terms of Opening of Default

Fact that corporate defendant claimed sheriff had never served summons upon the corporation, sheriff did not remember service of the summons, and default was not taken until seven years after the

plaintiff was injured constituted clear, unequivocal and convincing proof to rebut weight accorded sheriff's return of service of process under section 16-2707 to open default judgment. *Sewell v. Beatrice Foods Co.*, 145 M 337, 400 P 2d 892.

## Rule 56. Summary judgment.

(a) FOR CLAIMANT. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

**History:** En. Sec. 56, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

### Amendments

The amendment of December 31, 1975, inserted "with or without supporting affidavits" near the end of the rule.

### Negligence Actions

Ordinarily, issue of negligence is not susceptible of summary adjudication but should motion for summary judgment be made, burden is on moving party to establish clearly that there is no factual issue to be determined and opposing party does not have burden of showing prima facie case. *Mally v. Asanovich*, 149 M 99, 423 P 2d 294.

(b) FOR DEFENDING PARTY. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

**History:** En. Sec. 56, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

### Amendments

The amendment of December 31, 1975, inserted "with or without supporting affidavits" near the end of the rule.

### Denial of Motion

In suit by guardians of patient for personal injuries sustained when patient was being X-rayed, district court erred in granting defendant-hospital's motion for summary judgment where there was an issue of fact as to whether radiologist was an independent contractor rather than an agent of the hospital. *Kober v. Stewart*, 148 M 117, 417 P 2d 476, 479.

### No Issue of Negligence

Defendant, whose electrical power lines were installed in compliance with the minimum safety requirements of the national safety code, was entitled to summary judgment in negligence action brought by plaintiff who, although aware of overhead power lines, was severely shocked when he hoisted a long metal pole into contact with the lines while drilling a well. *Sprankle v. DeCock*, — M —, 530 P 2d 457.

### Support Proceedings

Defendant was properly granted motion for summary judgment in action to enforce amount agreed upon for support in separation agreement which had been reduced by subsequent court modifications. *Gessell v. Jones*, 149 M 418, 427 P 2d 295.

**References**

Silloway v. Jorgenson, 146 M 307, 406 P 2d 167.

(c) **MOTION AND PROCEEDINGS THEREON.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

**History:** En. Sec. 56, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

**Amendments**

The 1965 amendment inserted "answers to interrogatories" in the first sentence.

The amendment of December 31, 1975, inserted the second sentence; inserted "answers to interrogatories" in the third sentence; inserted "together with the affidavits, if any" in the third sentence; and deleted a former third sentence which read "Affidavits shall not be considered for any purpose on motion for summary judgment."

**Commission Note to 1965 Amendment**

The amendment expressly includes "answers to interrogatories" among material which may be considered on motion for summary judgment. This conforms to an amendment to the Federal Rule adopted January 21, 1963, the Federal Rule having inadvertently omitted the phrase. The courts have generally reached by interpretation the result required by the amendment.

**Affidavits**

Affidavit of superintendent of banks will be struck from record on appeal from a summary judgment because under this rule it could not have been considered by the trial court in ruling on motion for summary judgment. *Miners & Merchants Bank v. Dowdall*, 158 M 142, 489 P 2d 1274.

**Appeal**

Summary judgment on issue of liability only was "interlocutory in character" and not appealable until damage issue had been resolved; time for taking appeal did not run from entry of summary judgment on liability but would commence upon entry of final order. *Schultz v. Adams*, 161 M 463, 507 P 2d 530.

**Broker's Commission**

Where it was agreed that there was no written agreement to pay the broker's commission, but only an oral promise by the administrator of estate to petition court for allowance of commission, summary judgment was proper; nor did the plaintiff's presentation of various legal theories on which relief might be granted raise any genuine issue of fact. *Meech v. Cure*, — M —, 525 P 2d 546.

**Burden of Proof**

The moving party for a summary judgment has the burden of showing the absence of any genuine factual issue. *Kober v. Stewart*, 148 M 117, 417 P 2d 476, 478; *Rickard v. Paradis*, — M —, 539 P 2d 718; *Storrusten v. Harrison*, — M —, 549 P 2d 464, 466; *Baylor v. Jacobson*, — M —, 552 P 2d 55.

Where the record discloses no genuine issue of material fact, party opposing motion for summary judgment has burden of presenting evidence of a material and substantial nature raising such an issue. *Rickard v. Paradis*, — M —, 539 P 2d 718; *Montana Deaconess Hospital v. Gratton*, — M —, 545 P 2d 670; *Harland v. Anderson*, — M —, 548 P 2d 613; *Barich v. Ottenstror*, — M —, 550 P 2d 395.

**Contributory Negligence**

Summary judgment, finding that eight-year-old plaintiff was guilty of contributory negligence as a matter of law, was improperly granted, since there is an issue of fact as to whether a child has the capacity for contributory negligence as a matter of law. *Ranard v. O'Neil*, — M —, 531 P 2d 1000.

**Issue of Fact**

Although plaintiff had not filed formal claim against city within the time limits prescribed, issues of fact as to the fact and extent of knowledge by city that plaintiff had been injured, precluded sum-

mary judgment. State ex rel. City of Bozeman v. District Court, — M —, 531 P 2d 1343.

### Matters Considered

While this rule does not mention oral testimony as material to be used at the summary judgment hearing, Rule 43(e) permits the use of oral testimony upon motions, so that oral testimony may be considered upon a motion for summary judgment. Daniels v. Paddock, 145 M 207, 399 P 2d 740.

In case in which plaintiff's deposition alone was sufficient to permit the trial judge to determine that the case contained no issue of material fact or controversy relating to the testatrix's incompetency, the trial court was correct in granting summary judgment and had no duty to anticipate possible proof that might have been offered under the pleadings. Silloway v. Jorgenson, 146 M 307, 406 P 2d 167.

Where trial court was present during taking of depositions, facts heard by court were properly considered on motion for summary judgment pursuant to this section since oral testimony is properly within matters which court may consider under such motion. Citizens State Bank v. Duus, 154 M 18, 459 P 2d 696.

Although fact that both parties moved for summary judgment does not establish that all factual questions have been answered, trial court need only consider evidence and issues presented and has no duty to anticipate possible proof that might be offered under the pleadings. Faith Lutheran Retirement Home v. Veis, 156 M 38, 473 P 2d 503.

### No Genuine Issue of Fact

No genuine issue of fact was raised in action for rescission of contract to purchase motel, where seller had represented that motel was "capable" of producing a certain income; and although seller had failed to deliver bill of sale for motel furnishings, there was no resulting damage upon which rescission could be based. Beierle v. Taylor, — M —, 524 P 2d 783.

### Pleadings Not Controlling

On a motion for summary judgment the formal issues presented by the pleadings are not controlling and the court must consider the depositions, answers to interrogatories, and admissions on file, oral testimony and exhibits presented. Hager v. Tandy, 146 M 531, 410 P 2d 447.

### Principal and Agent

Purported agent and principal were entitled to summary judgment where plaintiff wholly failed to establish prima facie case of negligence on the part of either even though evidence raised question of

fact as to existence of agency since it would be impossible to impute negligence to principal where negligence had not been established against supposed agent. Knowlton v. Sandaker, 150 M 438, 436 P 2d 98.

### Proof of Issue of Fact

Motion for summary judgment was properly granted where it was apparent from record that there was no genuine issue as to any material fact, notwithstanding aggrieved party's argument on appeal that had he been allowed to go to trial he would have presented proofs establishing genuine issue of fact, since aggrieved party presented no such proofs at hearing on original motion nor at hearing on motion to vacate judgment. Brown v. Thornton, 150 M 150, 432 P 2d 386.

Trial court, in action on farm lease, construing lessor's motion for dismissal as motion for summary judgment, improperly granted summary judgment where lessor failed to sustain burden of showing absence of any genuine issue as to material facts; record on appeal was replete with issues of fact determinable by jury. Byrne v. Plante, 154 M 6, 459 P 2d 266.

In an action for injuries allegedly caused by negligence of contractor and his agents, trial court properly granted summary judgment pursuant to this section where record revealed total absence of negligence on part of defendant or its employees and record revealed that nothing defendant did or failed to do was proximate cause of plaintiff's injuries. Flansberg v. Montana Power Co., 154 M 53, 460 P 2d 263.

Summary judgment for defendant was proper where contract clearly prohibited competing activities only on specific premises and plaintiff admitted in his answers to interrogatories that the activities he sought to prevent were outside the premises. Matteucci's Super Save, Drug v. Hustad Corp., 158 M 311, 491 P 2d 705.

### Purpose

The general purpose of this rule is to dispose promptly of actions in which there is no genuine issue of fact, thereby eliminating unnecessary trial, delay, and expense. Silloway v. Jorgenson, 146 M 307, 406 P 2d 167; Harland v. Anderson, — M —, 548 P 2d 613.

### Questions of Fact

Allegation by vendees of direct misrepresentation as to acreage they were being sold raised material issue of fact for the jury precluding summary judgment in action to cancel contract for deed and reinvest title in vendors. Eisemann v. Hagel, 157 M 295, 485 P 2d 703.

Summary judgment was not proper where pleadings in declaratory judgment



action to invalidate municipal vacation of streets left triable issues of fact as to whether plaintiffs' easements would be impaired by vacation. *Kemmer v. City of Bozeman*, 158 M 354, 492 P 2d 211.

Liability cannot be adjudicated upon motion for summary judgment where factual issues concerning negligence and causation are presented. *Duchesneau v. Silver Bow County*, 158 M 369, 492 P 2d 926.

### Res Judicata

Where supreme court affirmed lower court judgment dismissing complaint for failure to state a claim upon which relief could be granted under Rule 12(b), the judgment was not res judicata as to a second amended complaint under this section where matters outside the pleadings were presented to and not excluded by court. *Rambur v. Diehl Lumber Co.*, 144 M 84, 394 P 2d 745, 749.

### Statute of Frauds

Potential buyer was properly granted summary judgment for return of earnest

money when defendant realtor could produce no written documents to support his claims relative to listing property for sale and acting as real estate agent for property owners. *Pack River Co. v. Young*, — M —, 511 P 2d 12.

### Third Party Complaint

Summary judgment should not have been granted in favor of third party defendant on third party complaint initiated by hospital sued for negligence by minor patient burned by defective television switch while in hospital where third party complaint raised genuine issue of material fact as to whether minor patient was injured solely through negligence of third party defendant who had leased television equipment to hospital. *Crosby v. Billings Deaconess Hospital*, 149 M 314, 426 P 2d 217, distinguished in — M —, 531 P 2d 1337.

### References

*Brannon v. Lewis and Clark County*, 143 M 200, 387 P 2d 706.

## (d) CASE NOT FULLY ADJUDICATED ON MOTION.

**History:** En. Sec. 56, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

### Amendments

The amendment of December 31, 1975, made no change in this rule.

### Declaratory Judgment

In declaratory judgment action in

which notice of reclassification was found not to comply with statutory requirements, district court did not abuse its discretion in granting plaintiff-landowners' motion for summary judgment without considering further issues on the power to reclassify since plaintiffs lacked standing as to those issues. *Mittelstadt v. Buckingham*, 156 M 407, 480 P 2d 831.

(e) **FORM OF AFFIDAVITS; FURTHER TESTIMONY; DEFENSE REQUIRED.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

**History:** En. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

(f) **WHEN AFFIDAVITS ARE UNAVAILABLE.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition,

the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

**History:** En. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

(g) **AFFIDAVITS MADE IN BAD FAITH.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

**History:** En. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

### Rule 57. Declaratory judgments.

#### References

Harrer v. Northern Pacific Ry. Co., 147 M 130, 410 P 2d 713; Empire Fire &

Marine Ins. Co. v. Goodman, 147 M 396, 412 P 2d 569.

### Rule 59. New trials—Amendment of judgments.

(a) **GROUND.** A new trial may be granted to all or any of the parties and on all or part of the issues for any of the reasons provided by the statutes of the state of Montana.

A motion for new trial shall state with particularity the grounds therefor, it not being sufficient merely to set forth the statutory grounds, but the motion may be amended, upon reasonable notice, up to and including the time of hearing the motion.

On motion for a new trial in an action tried without a jury, the court may take additional testimony, amend the findings of fact and conclusions of law or make new findings and conclusions, set aside, vacate, modify or confirm any judgment that may have been entered or direct the entry of a new judgment.

**History:** En. Sec. 59, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

#### Amendments

The amendment of May 21, 1969 made no change in this rule.

The amendment of December 31, 1975, inserted the present second paragraph.

#### Advisory Committee's Note to December 31, 1975 Amendment

Halsey v. Uithof, — Mont. —, 532 P 2d 686, 32 St. Rep. 89, requires a motion for new trial to set forth the grounds with particularity, and just using the statutory grounds is not sufficient. The Montana Supreme Court relied upon Rule 7(b) as the basis for this requirement.

Rule 7(b) requires that all motion shall state with particularity the grounds therefor, but this has not always been followed, particularly with Rule 12 motions. Thus, as a matter of practice, the Rule 7(b) requirement has carried the implication "where necessary".

Rather than broaden the technical operation of Rule 7(b), the Advisory Committee felt that the changes in practice regarding motions for new trials in the district courts, initiated by Halsey, should be incorporated in Rule 59.

The additional amendment requiring that orders granting new trials shall set forth the grounds with sufficient particularity to apprise the parties and the appellate court of the trial court's rationale is for the express purpose of narrowing the issues on appeal and obviating the need

to read the entire record on appeal to find the rationale underlying the trial court's ruling. This does not limit the parties or the appellate court in the scope of appellate argument or review, e.g., a new trial properly granted but based on an erroneous rationale.

### Appellate Review

In condemnation proceeding, where state appraised land at \$18,000, condemnee appraised it at \$95,000 and jury awarded condemnee \$21,000, granting of new trial because award was inadequate was not such an abuse of trial judge's discretion as to warrant reversal in spite of the fact there was no rebuttal of state's only expert witness. *State Highway Commission v. Greenfield*, 145 M 164, 399 P 2d 989.

### Inadequacy of Award

Court abused discretion in granting new trial "upon the grounds of insufficiency of the evidence to justify the verdict in that the verdict awarded by the jury to the plaintiff is wholly inadequate" where there was conflict in evidence and where it was question for jury whether injuries suffered by passenger were caused by grossly negligent operation of car or whether passenger assumed risk of going into car driven by man who had several drinks. *Heen v. Tiddy*, 151 M 265, 442 P 2d 434.

### Jury Misconduct

New trial was properly granted where foreman of jury made his own investiga-

tion at the scene of the accident after hearing testimony and informed the other members of jury, during their deliberation, of the results of his investigation. The foreman was guilty of misconduct upon which verdict could be impeached by affidavits of jurors. *Goff v. Kinzie*, 148 M 61, 417 P 2d 105, 107, distinguished in 456 P 2d 835, 496 P 2d 1136, 1140.

### Mistake or Inadvertence

Grant of new trial to permit plaintiff to give additional testimony on issue of damages only was not improper, notwithstanding that ground for relief was mistake or inadvertence and should have been given pursuant to Rule 60(b), where no intervening rights had attached in reliance upon judgment and no actual injustice would ensue. *John J. Ming, Inc. v. District Court*, 155 M 84, 466 P 2d 907.

### New Evidence

Ex parte affidavit which alleged newly discovered evidence but was only cumulative in nature was insufficient in light of the record to authorize a new trial. *Fisher v. Mitzel*, 158 M 265, 491 P 2d 186.

### Recomputation of Hours

Hearing on a case remanded for recomputation of hours worked by the plaintiff should not include the reception of new evidence, but merely a recalculation of evidence already in the records. *Glick v. State, Montana Department of Institutions*, — M —, 528 P 2d 686.

## DECISIONS UNDER FORMER LAW

### Right To Appeal

Defendant was entitled to appeal, in spite of time limitation of section 93-5606 for filing bill of exceptions where motion for new trial was combined with motion to amend findings and request for

review of facts, conclusions of law and judgment, since limitation under section 93-5606 did not apply prior to enactment of new rules of civil procedure. *Crissey v. State Highway Commission*, 147 M 374, 413 P 2d 308.

(b) **TIME FOR MOTION.** A motion for a new trial shall be served not later than 10 days after service of notice of the entry of the judgment.

**History:** En. Sec. 59, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

### Amendments

The amendment of May 21, 1969 made no change in this rule.

### References

*Clark v. Worrall*, 146 M 374, 406 P 2d 822.

(c) **TIME FOR SERVING AFFIDAVITS.** When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which periods may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.



**History:** En. Sec. 59, Ch. 13, L. 1961;  
amd. Sup. Ct. Ord. 10750-9, May 21, 1969,  
eff. July 1, 1969.

**Amendments**

The amendment of May 21, 1969 made  
no change in this rule.

(d) **TIME FOR HEARING ON MOTION.** Hearing on the motion shall be had within 10 days after it has been served, or within 10 days after the party opposing the motion for new trial has served his affidavits as set forth in subparagraph (c) hereinabove except that at any time after the notice of hearing on the motion has been served the court may issue an order continuing the hearing for not to exceed 30 days. In case the hearing is continued by the court, it shall be the duty of the court to hear the same at the earliest practicable date thereafter, and the court shall rule upon and decide the motion within 15 days after the same is submitted. If the court shall fail to rule upon the motion within said time, the motion shall, at the expiration of said period, be deemed denied.

The decision on the motion may be entered in the minutes of the court, or may be made in writing in chambers or in any county in the state where the judge may be, and be filed with the clerk of court in the county where the action is pending. Upon the hearing, reference may be had in all cases to the pleadings and the orders of the court on file, and reference may also be had to any depositions and documentary evidence offered on the trial, and to the proceedings on the trial and, when necessary, reference may be had to the notes of the court reporter.

If the motion is not noticed up for hearing and no hearing is held thereon, it shall be deemed denied as of the expiration of the period of time within which hearing is required to be held under this Rule 59.

**History:** En. Sup. Ct. Ord. 10750-9,  
May 21, 1969, eff. July 1, 1969.

**Expiration of Time**

Motion for new trial was automatically denied ten days after service where motion did not contain a notice of hearing and no hearing was held, despite district court clerk's letter dated twenty-two days after filing of motion, informing movant that motion for new trial had been denied. *Leitheiser v. Montana State Prison*, 161 M 343, 505 P 2d 1203.

**Failure to Comply**

Granting of new trial was reversible error where time limits set forth in this rule were disregarded. *Cain v. Harrington*, 161 M 401, 506 P 2d 1375.

**Remand by Supreme Court**

Where supreme court vacated orders of judge who had been disqualified and remanded motion for new trial for hearing before new judge, the time limits of this rule were not applicable since there was no final judgment from which time limits could be computed. *Kamp Implement Co. v. Amsterdam Lumber, Inc.*, — M —, 533 P 2d 1072.

**Compiler's Notes**

The amendment of Rule 59 by Supreme Court Order No. 10750-9 enacted this subparagraph as Rule 59(d) and designated former Rules 59(d) and 59(e) as 59(e) and 59(f), respectively.

**Advisory Committee's Note to May 21, 1969 Amendment**

Explanation of change: Section 93-5606, R. C. M. 1947, is hereby superseded. There has been some confusion by reason of ambiguous language in section 93-5606, R. C. M. 1947, a hold-over statute from the practice which existed before the rules were adopted, and because of the necessity of researching for, and referring to, the case decisions under the statute spelling out the jurisdictional time limits and the effect thereof. It is felt that by incorporating our practice into this one rule, and eliminating the necessity of referring to statutes and case decisions, that it will be easier for the practitioner to comply.

**DECISIONS UNDER FORMER LAW**

**Appellate Review**

The appellate court may not disturb the findings of the trial court in ordering a

new trial without a showing of abuse of discretion. *Campeau v. Lewis*, 144 M 543, 398 P 2d 960.

**Judge's Discretion**

The jury is delegated the task of finding the facts, but the trial judge has the discretion to prevent a miscarriage of justice by granting a new trial if there is an insufficiency of evidence to support the verdict. *Campeau v. Lewis*, 144 M 543, 398 P 2d 960, explained in *Morris v. Corcoran Pulpwood Co.*, 154 M 468, 465 P 827.

**Purpose of Rule**

The purpose of this rule is to give a trial judge power to prevent what he considers a miscarriage of justice. *Campeau v. Lewis*, 144 M 543, 398 P 2d 960.

**Scope**

This rule permits the trial judge to order a new trial on his own initiative for the same reasons one could be ordered pursuant to section 93-5603 and is subject

to the same interpretations as expressed in previous opinions on motions for new trials before adoption of the rule. *Campeau v. Lewis*, 144 M 543, 398 P 2d 960.

**Time Limits**

Combined motion for new trial and to alter, amend and supplement findings of fact, conclusions of law and judgment was not subject to time limits of former section 93-5606 requiring prompt hearing on new trial motion and superseded by this rule. *State ex rel. Rozan v. District Court, Sixteenth Judicial District*, 147 M 532, 416 P 2d 19, 21. See also *Crissey v. State Highway Commission*, 147 M 374, 413 P 2d 308.

**References**

*Waite v. Waite*, 143 M 248, 389 P 2d 181; *State ex rel. Wilson v. District Court*, 143 M 543, 393 P 2d 39.

(e) ON INITIATIVE OF COURT. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion.

**History:** En. Sec. 59, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

**Compiler's Notes**

The amendments of Rule 59 by Supreme Court Order No. 10750-9 designated this former Rule 59(d) as Rule 59(e).

**Amendments**

The amendment of September 29, 1967 added the second sentence and made changes in phraseology.

The amendment of May 21, 1969 made no change in the wording of this rule.

The amendment of December 31, 1975, deleted the last sentence which read "In either case, the court shall specify in the order the the grounds therefor."

**Advisory Committee's Note to September 29, 1967 Amendment**

Source: Fed. R. Civ. P. 59(d), as amended 1966.

Explanation of change: The purpose of this amendment is to make it clear that a court, after notice and opportunity to be heard, may grant a new trial even though a motion for new trial has been made, for a ground not stated in the motion. Some cases have held otherwise.

**Advisory Committee's Note to December 31, 1975, Amendment**

See note under Rule 59 (a).

(f) ORDER GRANTING NEW TRIAL. Any order of the court granting a new trial, shall specify the grounds therefor with sufficient particularity as to apprise the parties and the appellate court of the rationale underlying the ruling, and this may be done in the body of the order, or in an attached opinion.

**History:** En. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

**Compiler's Notes**

The amendment of Rule 59 by Supreme Court Order No. 10750, December 31, 1975, enacted this subparagraph as Rule

59 (f) and designated former Rule 59 (f) as Rule 59 (g).

**Advisory Committee's Note to December 31, 1975, Amendment**

See note under Rule 59 (a).

(g) **MOTION TO ALTER OR AMEND A JUDGMENT.** A motion to alter or amend the judgment shall be served not later than 10 days after the service of the notice of the entry of the judgment, and may be combined with the motion for a new trial herein provided for. This motion shall be heard and determined within the time provided hereinabove with respect to a motion for a new trial.

**History:** En. Sec. 59, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Sept. 7, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

#### Compiler's Notes

The amendment of Rule 59 by Supreme Court Order No. 10750-9 designated this former Rule 59(e) as Rule 59(f).

The amendment of Rule 59 by Sup. Ct. Ord. 10750, Dec. 31, 1975, designated this former Rule 59 (f) as Rule 59 (g).

#### Amendments

The amendment of September 7, 1965 added a second paragraph which read: "Motions provided by this subdivision shall be heard and determined within the time provided by Section 93-5606 of the 1947 Revised Codes of Montana in the case of motions for a new trial."

The amendment of May 21, 1969 added "and may be combined with the motion for a new trial herein provided for" to the first sentence; substituted the second sentence for the former second paragraph added in 1965; and made changes in phraseology.

The amendment of December 31, 1975, redesignated this rule; and made no other change.

**Advisory Committee's Note to December 31, 1975, Amendment**

See note under Rule 59 (a).

#### Additur

This rule did not give the district court power to order an additur to a condemnation award as a condition of denying motion for new trial. *State Highway Commission v. Schmidt*, 143 M 505, 391 P 2d 692.

#### Time Limit

A motion to alter, amend, and supplement findings of fact, conclusions of law and the judgment, combined with a motion for a new trial filed on September 28, 1965 was a motion contemplated by this rule and Rule 52(b) and was not governed by the time limits of section 93-5606. *State ex rel. Rozan v. District Court of Sixteenth Judicial District*, 147 M 532, 416 P 2d 19, 21.

#### Untimely Order

Order granting motion to alter or amend judgment was void where hearing was not held within ten days after service as required by this rule; time and procedural limitations for motions subsequent to judgment set out in this rule are mandatory. *Armstrong v. High Crest Oils, Inc.*, — M —, 520 P 2d 1081.

### Rule 60. Relief from judgment or order.

(b) **MISTAKES—INADVERTENCE—EXCUSABLE NEGLIGENCE—NEWLY DISCOVERED EVIDENCE—FRAUD, ETC.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) when a defendant has been personally served, whether in lieu of publication or not, not more than



60 days after the judgment, order or proceeding was entered or taken, or, in a case where notice of entry of judgment is required by Rule 77(d), not more than 60 days after service of notice of entry of judgment. When from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representative, at any time within 180 days after the rendition of any judgment in such action, to answer to the merits of the original action. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as may be required by law, or to set aside a judgment for fraud upon the court.

**History:** En. Sec. 60, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Aug. 1, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### Amendments

The amendment of August 1, 1965 substituted "within 60 days when a defendant has been personally served, whether in lieu of publication or not, calculated from the date of service of notice of entry of the judgment or order or action taken in the proceeding" for "not more than one year after the judgment, order or proceeding was entered or taken" after "for reasons (1), (2), and (3)" in the second sentence; and inserted the third sentence.

The amendment of September 29, 1967 rewrote the second sentence; and substituted "required" for "provided" in the last sentence.

#### Commission Note to August 1, 1965 Amendment

The purpose of this amendment is to make the Montana practice correspond to practice under the last sentence of R. C. M. 1947, § 93-3905 (which was repealed with the adoption of the Rules of Civil Procedure), as construed in *Smith v. Collis*, 42 Mont. 350, 365-370 (1910). The time within which the motion may be made is shortened, but considered adequate.

#### Advisory Committee's Note to September 29, 1967 Amendment

Source: None.

The federal rule measures the time for the motion for reasons (1), (2), and (3) from time the "judgment, order, or proceeding was entered or taken." The Montana rule measures the time from the "date of service of entry of the judgment or order or action taken"; but Rule 77(d), requiring notice of entry, is confined to judgments in actions in which an appearance has been made. This amendment, using the federal rule language adjusted

to the requirements of Montana Rule 77(d), is for the purpose of avoiding ambiguity and litigation as to what, if any, time limit is imposed in cases of orders, and proceedings, and judgments where no appearance has been made.

#### Change of Counsel

Motion to have judgment vacated as to date and redated so as to permit moving party to file exceptions to findings or take other steps counsel deemed necessary for protection of client was improperly denied, and was abuse of discretion where moving party had inadequate time in which to obtain present counsel when conflict of interest arose with prior counsel. *Schmidt v. Lloyd*, 152 M 158, 447 P 2d 485.

#### Discretion of Court

Where record showed that defendant took no action for nearly three months after default judgment had been entered, defendant was not prejudiced by plaintiff's failure to give written notice of application for default judgment as required by M. R. Civ. P., Rule 55(b)(2), and district court did not abuse its discretion in denying defendant's motion to vacate the default judgment under M. R. Civ. P., Rule 55(c). *Williams v. Superior Homes, Inc.*, 148 M 38, 417 P 2d 92, 94.

Slight abuse of discretion in refusing to set aside default judgment for "mistake, inadvertence, surprise, or excusable neglect" is sufficient to justify reversal, and when motion to vacate default judgment is supported by showing which leaves court in doubt or upon which reasonable minds might reach different conclusions, the doubt should be resolved in favor of the motion. *Uffleman v. Labbit*, 152 M 238, 448 P 2d 690.

#### Excusable Neglect

Defendant's contention that "personal problems drove all thought of lesser problems from his mind" was not sufficient to set aside a default judgment under sub-

section 1 of this section. *Dudley v. Stiles* 142 M 566, 386 P 2d 342.

Grant of new trial pursuant to Rule 59(a) to permit plaintiff to give additional testimony on damages that had been omitted by excusable neglect was not improper, notwithstanding that such relief should have been given under this section, where no intervening rights had attached in reliance upon judgment and no actual injustice would ensue. *John J. Ming, Inc. v. District Court*, 155 M 84, 466 P 2d 907.

Where attorney for defendant had three other active files under same defendant's name and inadvertently filed complaint in one of the other files, with result that answer was not filed in time and plaintiff took judgment by default, a motion pursuant to clause (1) stating the facts and that there was a meritorious defense was adequate to set aside default judgment without verification and without affidavit of merit. *Keller v. Hanson*, 157 M 307, 485 P 2d 705.

#### Failure to Appeal

After motion to set aside judgment on grounds of fraud was denied and evidence of fraud was rejected by the court, plaintiff's remedy was to appeal the denial, and his failure to do so rendered the decision res judicata and barred the filing of a second action to litigate the same claim or issues. *Kamp Implement Co. v. Amsterdam Lumber, Inc.*, — M —, 533 P 2d 1072.

#### Failure to File in Time

Defendant's motion to vacate default judgment was properly denied under this rule where the motion was not filed until more than 480 days after the entry of judgment despite fact that defendant was served with neither summons nor complaint; filing of motion to vacate default judgment under this rule did not constitute a selection of remedies and movant, after denial of motion, was still free to bring an independent action to vacate the judgment for failure to receive service which action would not be subject to the 180 day limitation contained in this rule. *Thomas v. Savage*, 161 M 192, 505 P 2d 118.

#### Fraudulently Obtained Judgments

Time within which trial court could set aside judgment on basis of fraud upon the court depended upon equity and discretion, not time limitation of this rule. In *re Bad Yellow Hair*, — M —, 509 P 2d 9.

#### Judgment Obtained by Fraud

Court of equity has inherent power, independent of statute, to vacate judgment obtained by fraud in violation of last sentence of Rule 60(b) even though party

seeking relief was not necessary party in original action and motion to vacate was not made within liberal time limits prescribed by rule but was nevertheless timely considering that aggrieved party engaged attorney to file motion to vacate within thirty days after discovery of existence of judgment. *Selway v. Burns*, 150 M 1, 429 P 2d 640, distinguished in — M —, 533 P 2d 1072.

In quiet title action, district court properly denied motion to set aside default decree where moving party had no color of title; under this section default judgment will be set aside for excusable neglect only if movant is able to show good defense on merits. *Diamond Investment Co. v. Geagan*, 154 M 122, 460 P 2d 760.

#### Meritorious Defense

Answer and counterclaim need not be verified when submitted with motion under this rule which stated generally that there was a meritorious defense, and there is no longer a requirement for an affidavit of merit. *Keller v. Hanson*, 157 M 307, 485 P 2d 705.

#### Mistake of Law

Mistaken belief of party, against whom default judgment was taken, as to legal effect of contract with adverse party was mistake of law, rather than mistake of fact, and was not such a "mistake" as would support vacating the default. *Uffelman v. Labbit*, 152 M 238, 448 P 2d 690.

#### No Substitute for Appeal

Defendants who had filed an appeal but never perfected it, could not use this rule to raise an issue which had been presented at the original proceedings, or to relitigate matters previously determined. *Sheridan v. Martinsen*, — M —, 523 P 2d 1392.

#### Probate Matters

Final decree of distribution and discharge in probate will not be set aside on ground of inadvertence or fraud either under statute or Rule 60(b) in absence of manifest abuse of court's discretion in case where moving party had every opportunity to protect his claim in probate and failed to do so. *Werning v. McFarland*, 149 M 137, 423 P 2d 851.

#### Reasonable Time

County commissioners' motion to dismiss peremptory writ of mandate was made within a reasonable time where it was made within the time allowed for an appeal and promptly after commissioners learned that statutes controlling dispute had been amended. *Snyder v. McKinley*, — M —, 521 P 2d 919.

#### Scope of Rule

Contention that default judgment was



erroneous on its face and should be set aside because the judgment and an exhibit attached to the complaint contained inaccurate and erroneous language was outside scope of rule and could not be raised thereunder. *Uffleman v. Labbit*, 152 M 238, 448 P 2d 690.

### **Voidable Judgment**

This rule does not apply to voidable judgments. *Interstate Counseling Service v. Emeline*, 144 M 409, 396 P 2d 727, 728. (Dissenting opinion, 144 M 409, 396 P 2d 727, 729.)

This rule has no application to prematurely entered default judgments since it applies to void and not voidable judgments. *Sowerwine v. Sowerwine*, 145 M 81, 399 P 2d 233.

## **(c) TIME FOR HEARING AND DETERMINING MOTIONS.**

Motions provided by subdivisions (a) and (b) of this rule shall be heard and determined within the times provided by Rule 59 in the case of motions for new trials and amendment of judgment.

**History:** En. Sup. Ct. Ord. 10750, Sept. 7, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

### **Amendments**

The amendment of May 21, 1969 substituted "Rule 59" for "section 93-5606 of the 1947 Revised Codes of Montana" and

### **Waiver of Right to Relief**

Where proper notice of hearing on application for judgment of divorce was given defendant in accordance with M. R. Civ. P., Rule 55(b) and no relief different from that demanded in the complaint was granted in violation of Rule 54(c), an appeal on those grounds was dismissed by the supreme court on its own motion where no application to set aside the default or judgment was made under this rule. *Sowerwine v. Sowerwine*, 148 M 195, 418 P 2d 859, 861.

### **References**

*Kraus v. Treasure Belt Min. Co.*, 146 M 432, 408 P 2d 151; *Wolfe v. Northern Pacific Ry. Co.*, 147 M 29, 409 P 2d 528.

"trials" for "trial"; and added "and amendment of judgment."

### **Advisory Committee's Note to May 21, 1969 Amendment**

Explanation of change: Since section 93-5606, R. C. M. 1947, is being superseded because of changes in Rules 46, 52 and 59, the change in Rule 60(c) is likewise required.

## **Rule 61. Harmless error.**

### **Clerk's Error**

Omission of clerk of court to require affidavit of amount due under Rule 55(b) (1) before entry of default judgment in favor of plaintiff is not fatal unless refusal to take action with respect to the omission appears to the court inconsistent with substantial justice. *Interstate Counseling Service v. Emeline*, 144 M 409, 396 P 2d 727, 728. (Dissenting opinion, 144 M 409, 396 P 2d 727, 729.)

### **Contributory Negligence**

Submitting issue of contributory negligence to jury was harmless error in light of substantial evidence showing that defendant was not negligent and substantial evidence that even if defendant was negligent plaintiff was not injured in accident or injury was not result of defendant's negligence. *Brown v. Reel*, 148 M 381, 421 P 2d 454.

In a wrongful death action by father of eight and one-half year old boy, who, while riding a bicycle, was struck and killed by automobile, court's instruction that deceased boy was incapable of contributory negligence and court's refusal of defendant's offered instruction on con-

tributory negligence was not reversible error, irrespective of question of boy's capacity, since there was no substantial credible evidence of contributory negligence in fact on part of deceased boy. *Graham v. Rolandson*, 150 M 270, 435 P 2d 263.

### **Joint Enterprise**

Court's rulings with respect to issue of joint enterprise, if error, was harmless error, since driver was sole proximate cause of accident in which passenger suing owner of cattle was injured when car struck cattle on highway. *Ratcliff v. Murphy*, 150 M 31, 430 P 2d 627.

### **Poll of Jury**

Lower court abused discretion in granting new trial based solely on ground that it had erred in refusing request for poll of jury since error, if any, was harmless in light of evidence affirmatively showing that verdict was rendered in open court in presence of all counsel, that in response to question by judge, foreman of jury advised him they had agreed upon verdict, and that following reading of verdict



signed by foreman, judge inquired of jury if it was true verdict of at least eight of them and jury answered in affirmative. *Martello v. Darlow*, 151 M 232, 441 P 2d 175.

**References**  
*Steffes v. Crawford*, 143 M 43, 386 P 2d 842.

## **Rule 62. Stay of proceedings to enforce a judgment.**

(a) Superseded—M. R. App. Civ. P., Rule 7.

### **Supersession**

This section (Sec. 62, Ch. 13, L. 1961), relating to stay of proceedings upon entry

of judgment, is superseded by M. R. App. Civ. P., Rule 7.

(d) Superseded—M. R. App. Civ. P., Rule 7.

### **Supersession**

This section (Sec. 62, Ch. 13, L. 1961), relating to stay of proceedings upon ap-

peal, is superseded by M. R. App. Civ. P., Rule 7.

## **(e) STAY IN FAVOR OF THE STATE OF MONTANA OR AGENCY THEREOF.**

### **Eminent Domain Proceeding**

Where state highway commission filed notice of appeal and perfected their appeal after writ of execution under section 93-9918 had issued, the appeal stayed the

judgment although no bond was filed as required by section 93-8011, since under this rule no security was required from the state. *Robertson v. State Highway Commission*, 148 M 275, 420 P 2d 21, 24.

## **VIII. PROVISIONAL AND FINAL REMEDIES AND SPECIAL PROCEEDINGS**

### **Rule 68. Offer of judgment.**

#### **Rule 65. Injunctions.**

##### **References**

*Holtz v. Babcock*, 143 M 341, 389 P 2d 869.

#### **Rule 68. Offer of judgment.**

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon judgment shall be entered. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

**History:** En. Sec. 67, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### **Amendments**

The amendment of September 29, 1967 added the last sentence.

#### **Advisory Committee's Note to September 29, 1967 Amendment**

Source: Fed. R. Civ. P. 68, as amended 1966.

This logical extension of the concept of offer of judgment is suggested by the common admiralty practice of determining liability before the amount of liability is determined.

#### **Fraud on Court**

Although proper procedure was followed under rule providing for offer of judgment, conduct of parties in perpetrating fraud on court required that judgment be vacated on motion of aggrieved beneficiary who was not party to suit against estate. *Selway v. Burns*, 150 M 1, 429 P 2d 640.

#### **Offer in Same Amount as Subsequent Judgment**

Costs of suit were properly awarded to defendant where defendant made an offer of judgment in the exact amount that was eventually recovered by plaintiff. *Riefflin v. Hartford Steam Boiler Inspection & Ins. Co.*, — M —, 521 P 2d 675.

## **IX. APPEALS**

**Rule 72.** Appeal from a district court to the supreme court.

### **Rule 72. Appeal from a district court to the supreme court.**

When an appeal is permitted by law from a district court to the supreme court of Montana, or in any case where original proceedings are commenced in the supreme court, such appeal or original proceeding shall be taken, perfected, and prosecuted pursuant to the provisions of the Montana Rules of Appellate Civil Procedure and controlling statutes to the extent that they are not superseded by the Montana Rules of Appellate Civil Procedure.

**History:** En. Sec. 71, Ch. 13, L. 1961, amd. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

#### **Amendments**

The 1965 amendment rewrote this section. For previous text, see parent volume.

#### **Advisory Committee's Note**

Subdivision (a) of Rule 41, M. R. App. Civ. P. merely adapts the Montana Rules of Civil Procedure to these Appellate Rules.

## **X. DISTRICT COURTS AND CLERKS**

**Rule 77.** District courts and clerks.

### **Rule 77. District courts and clerks.**

#### **(b) TRIALS AND HEARINGS—ORDERS IN CHAMBERS.**

##### **Time for Hearing**

Notwithstanding that hearing on defendant's motion for summary judgment was held one day prior to scheduled date, such procedure was permissible under this

section since hearing was held with consent of both court and counsel. *Israelson v. Mountain Tractor Co.*, 155 M 69, 467 P 2d 149.

**(d) NOTICE OF ORDERS OR JUDGMENTS.** Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order or judgment is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers.

**History:** En. Sec. 72, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. Mar. 1, 1976.

**Amendments**

The amendment of December 31, 1975, completely rewrote this rule. For prior rule, see parent volume.

**Notice of Entry of Judgment Omitted**

The date of service of notice of entry of judgment is the arbitrary point in time from which the time limits for appeal begin to run. If no notice of entry of judgment

has been served upon the losing party, the right to appeal has not expired. Haywood v. Sedillo, — M —, 535 P 2d 1014.

**Sufficiency of Notice**

Notice sent to plaintiff's attorney that judgment had been entered in favor of defendant and stating that a copy of the order adjudging a dismissal with prejudice was attached, was sufficient for compliance with this rule even though a copy of the order was not actually attached. Jackson v. Tinker, 161 M 51, 504 P 2d 692.

(e) **TRANSMITTAL OF FILE ON REMOVAL.** Upon the filing of a copy of the petition for removal of any state district court action to the district court of the United States, district of Montana, and a request in writing therefor, the clerk of such state district court shall promptly deliver to the clerk of court of the district court of the United States, district of Montana, all papers then in the original state court file, or theretofore issued and subsequently filed and shall keep in the state court file only the copy of the petition for removal and such papers as were filed with the request for removal.

**History:** En. Sup. Ct. Ord. 10750-8, Sept. 10, 1968, eff. Jan. 1, 1969; amd. Sup. Ct. Ord. 10750-10, Oct. 22, 1971, eff. Jan. 1, 1972.

for "subsequently filed"; and substituted "copy of the petition for removal" and "request for removal" near the end of the rule for "notice of removal."

**Amendments**

The 1971 amendment substituted "the filing of a copy of the petition for removal" for "being served with a notice of the removal" at the beginning of the rule; inserted "and a request in writing therefor"; inserted "and subsequently filed" after "theretofore issued"; substituted "shall keep in the state court file"

**Advisory Committee's Note**

To define procedure and avoid unnecessary duplication of papers in state and federal court files. The proposed amendment correlates with Rule 10, Revised Rules of Procedure of the United States District Court for the District of Montana effective January 1, 1968.

## XI. GENERAL PROVISIONS

**Rule 86. Effective date—Statutes superseded.**

### Rule 81. Applicability in general.

#### (a) SPECIAL STATUTORY PROCEEDINGS.

##### Action To Remove Administrator

In statutory action for removal of administrator for misappropriation of funds of estate, administrator could be examined as adverse witness under Rule 43 notwithstanding provisions of Rule 81. In re Estate & Guardianship of Wyman, 149 M 525, 429 P 2d 629.

##### Review of Public Service Commission Rates

Under this rule, Montana Rules of

Civil Procedure were not applicable to proceeding to review actions and rates of Public Service Commission under section 70-128. Public Service Comm. of Montana v. District Court, — M —, 511 P 2d 334.

##### References

Stokes v. Delaney & Sons, Inc., 143 M 516, 391 P 2d 698.

#### (b) APPEALS TO DISTRICT COURTS.

##### References

Stokes v. Delaney & Sons, Inc., 143 M 516, 391 P 2d 698.



## (c) RULES INCORPORATED INTO STATUTES.

## References

Steffes v. Crawford, 143 M 43, 386 P 2d 842.

## Rule 83. Rules by district courts.

## Briefs Required on Preliminary Motion

Trial court rule requiring filing of briefs in support of preliminary motion is proper exercise of authority under this

rule and may be enforced by summary denial of motion where brief has not been filed. Hansen v. Kiernan, 159 M 448, 499 P 2d 787.

## Rule 86. Effective date—Statutes superseded.

(a) EFFECTIVE DATE AND APPLICATION TO PENDING PROCEEDINGS. These Rules became effective January 1, 1962. In accordance with Chapter 16, Laws of 1963, proposed amendments to these rules shall be first prepared by the advisory committee, which shall distribute copies thereof to the bench and resident bar of the state for their consideration and suggestions. Submission of proposed amendments to the court shall be made by the advisory committee only after the advisory committee has considered suggestions received from the bench and bar. Submissions to the court shall be noticed by the court by mailing notice, containing copies of the submitted proposals to all district judges and resident attorneys licensed to practice in the Montana courts as shown by the records of the clerk of the court, and the court will receive written suggestions and objections within the time fixed in the notice, which shall be not less than ninety (90) days thereafter. Oral hearings on proposals will be held only on special order of the court. Amendments adopted by the court will become effective on January 1 unless a different time be fixed in the order.

The court will annually, at least thirty (30) days prior to January 1, cause to be published all amendments to these rules which are to become effective on the succeeding January 1, and transmit the same to all judges and resident lawyers of the state. Such rules as are to become effective at times other than January 1 will be published and transmitted at least thirty (30) days prior to their effective date. These rules and amendments govern all proceedings and actions brought after they take effect, and also all further proceedings in actions then pending, except to the extent that in the opinion of the district court their application in a particular action pending when the rules or amendments take effect would not be feasible, or would work injustice, in which event the procedure existing at the time the action was brought applies.

History: En. Sec. 79, Ch. 13, L. 1961; amd. Ord. Sup. Ct. June 1, 1964, eff. July 1, 1964.

## Amendment

The 1964 amendment divided subdivision (a) into two paragraphs; inserted the second, third, fourth, fifth, and sixth sentences of the first paragraph and the first and second sentences of the second paragraph; substituted "These rules and amendments" for "They" at the beginning of the third sentence of the second para-

graph; inserted "or amendments" after "particular action pending when the rules" in the latter part of the third sentence of the second paragraph; and substituted "became effective" for "will take effect" in the first sentence of the first paragraph.

## Relation Back of Complaint

Question of relation back of complaint amended after adoption of Rules is governed by provisions of Rules even though action originated prior to effective date of Rules in absence of finding by court hav-

ing jurisdiction that Rules should not control. *Rozan v. Rosen*, 150 M 121, 431 P 2d 870.

### Retroactive Application

District court had the power to consider motion under procedure that was in effect when the motion was filed where the court believed application of amended rule would work an injury. *State ex rel. Rozan v. District Court of Sixteenth Judicial District*, 147 M 532, 416 P 2d 19, 21.

Rule 4B(1), M. R. Civ. P., applied to act of alleged malpractice occurring in Montana prior to effective date of the Montana Rules of Civil Procedure and doctor who had not resided in Montana since the effective date of the rules could

properly be served with process, under Rule 4D(3), in California. *State ex rel. Johnson v. District Court of Fourth Judicial District*, 148 M 22, 417 P 2d 109, 110.

The giving effect to the service of summons provisions of Montana Rules of Civil Procedure, Rule 4, subd. B, when the operative facts of the case to which the rule applied had taken place prior to the effective date provided in this section, was not a prohibited retroactive application of Rule 4, subd. B, within the meaning of section 12-201. *Weber v. Hydroponics, Inc.*, 226 F Supp 117, 118.

### References

*Steffes v. Crawford*, 143 M 43, 386 P 2d 842.

(b) **STATUTES SUPERSEDED.** Upon the taking effect of these rules or amendments thereto all statutes and parts of statutes in conflict therewith and the statutes listed in Tables B and C are superseded in respect of practice and procedure in the district courts.

**History:** En. Sec. 79, Ch. 13, L. 1961; amd. Ord. Sup. Ct. June 1, 1964, eff. July 1, 1964.

### Amendment

The 1964 amendment inserted "or amendments thereto" after "these rules"; and made another minor change in phraseology.

## Table A. Special statutory proceedings under Rule 81.

### Compiler's Notes

A number of sections referred to in this table have been repealed.

Sections 23-926 to 23-928 were repealed by Sec. 248, Ch. 368, Laws of 1969; for similar provisions, see sec. 23-3316.

Sections 23-2301 to 23-2304 were repealed by Sec. 248, Ch. 368, Laws of 1969; for similar provisions, see secs. 23-4101, 23-4104 to 23-4109.

Section 38-606 was repealed by Sec. 1, Ch. 310, Laws of 1969; for present law, see sec. 69-6401 et seq.

Sections 38-701 to 38-711 were repealed by Sec. 15, Ch. 112, Laws of 1963, Sec. 82, Ch. 266, Laws of 1963, and Sec. 10, Ch. 213, Laws of 1963; for present law, see sec. 80-2404.

Sections 38-801 to 38-819 were repealed by Sec. 82, Ch. 266, Laws of 1963, Sec. 10, Ch. 213, Laws of 1963, and Sec. 101, Ch. 199, Laws of 1965; for similar provisions, see secs. 38-1201 to 38-1233.

Sections 38-1101 to 38-1112 were repealed by Sec. 1, Ch. 230, Laws of 1959, and Sec. 101, Ch. 199, Laws of 1965; for present law, see secs. 80-2501 to 80-2503.

Section 40-3633 was repealed by Sec. 37, Ch. 362, Laws of 1969; for present law, see sec. 40-3664.

Section 66-1004 was repealed by Sec. 43, Ch. 338, Laws of 1969.

Sections 69-307 to 69-310 and 69-313 were repealed by Sec. 28, Ch. 264, Laws of 1955, and Sec. 223, Ch. 197, Laws of

1967; for present provisions, see secs. 69-4301 to 69-4317.

Section 69-522 was repealed by Sec. 223, Ch. 197, Laws of 1967; for present law, see sec. 69-4418.

Section 69-1335 was repealed by Sec. 223, Ch. 197, Laws of 1967; for similar provisions, see secs. 69-4816 and 69-4907.

Section 75-1634 was repealed by Sec. 496, Ch. 5, Laws of 1971; for present law, see sec. 75-8205.

Section 75-2901 was repealed by Sec. 496, Ch. 5, Laws of 1971; for present law, see sec. 75-6303.

Sections 75-3001 and 75-3002 were repealed by Sec. 16, Ch. 262, Laws of 1971.

Sections 80-810 and 80-815 to 80-817 were repealed by Sec. 82, Ch. 206, Laws of 1963, Sec. 242, Ch. 147, Laws of 1963, and Sec. 101, Ch. 199, Laws of 1965; for similar provisions, see sec. 80-2202 et seq.

Sections 80-1002 and 80-1003 were repealed by Sec. 101, Ch. 199, Laws of 1965.

Section 84-5617 was repealed by Sec. 32, Ch. 140, Laws of 1969; for a similar provision, see sec. 84-5606.25.

Section 94-101-1 to 94-101-33 were repealed by Sec. 2, Ch. 196, Laws of 1967; for new law, see secs. 95-2701 to 95-2713, 95-2715, and 95-2716.

Sections 94-901-1 to 94-901-18 were repealed by Sec. 3, Ch. 208, Laws of 1961; for new provisions, see secs. 93-2601-41 to 93-2601-82.

Table B. List of Rules Superseding Statutes.

		Statutes Superseded
Rule		(R. C. M. 1947, sections)
4D		16-809, 93-3008, 93-3011, 93-3012
41(e)		93-3002
52(a)		93-5302, 93-5303, 93-5411
52(b)		93-5305, 93-5306, 93-5307
59(a), (b), (c), (d)		93-5605, 93-5606

History: En. Sec. 82, Ch. 13, L. 1961; amd. Sec. 3, Ch. 14, L. 1963; amd. Sec. 2, Ch. 190, L. 1963; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

Amendments

The 1965 amendment added sections 16-809, 93-3008, 93-3011, and 93-3012 to the

list of sections superseded by Rule 4 D; and added section 93-3002 to the list of sections superseded by Rule 41(e).

The 1969 amendment added section 93-5302 to the list of sections superseded by Rule 52(a); inserted sections 93-5305, 93-5306, and 93-5307 as being superseded by Rule 52(b); added section 93-5606 to the list of sections superseded by Rule 59(d).

Table C. List of Statutes Superseded by Rules.

		Rules
Statutes Superseded		(R. C. M. 1947, sections)
93-3002		41(e)
93-3008		4D
93-3011		4D
93-3012		4D
93-5302		52(a)
93-5305		52(b)
93-5306		52(b)
93-5307		52(b)
93-5606		59(d)
16-809		4D

History: En. Sec. 83, Ch. 13, L. 1961; amd. Sec. 4, Ch. 14, L. 1963; amd. Sec. 3, ch. 190, L. 1963; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

Amendments

The 1965 amendment added sections 16-809, 93-3002, 93-3008, 93-3011, and 93-3012 to the table.

The 1969 amendment added sections 93-5302, 93-5305 to 93-5307 and 93-5606 to the table.

CHAPTER 2801—RULES OF PRACTICE ADOPTED BY SUPREME COURT  
Section 93-2801-3. Distribution of proposed rules—suggestions of bench and bar.

93-2801-3. Distribution of proposed rules—suggestions of bench and bar. Before any rule is adopted, the supreme court shall distribute copies of the proposed rule to the bench and bar of the state for their consideration and suggestions and shall give due consideration to such suggestions



as they may submit to the court. The state bar of Montana or the association of Montana judges may file with the supreme court a petition specifying its suggestions concerning any existing or proposed rule and requesting a hearing thereon within 6 months after the filing of the petition.

**History:** En. Sec. 3, Ch. 16, L. 1963; bar of Montana" for "Montana Bar Association" in the second sentence; and  
amd. Sec. 54, Ch. 344, L. 1977. made minor changes in phraseology.

**Amendments**

The 1977 amendment substituted "state

CHAPTER 2901—SUPPORT OF CHILDREN BORN OUT OF WEDLOCK

(Repealed—Section 31, Chapter 512, Laws of 1975)

**93-2901-1 to 93-2901-11. Repealed.**

**Repeal**

Sections 93-2901-1 to 93-2901-11 (Secs. 1 to 11, Ch. 233, L. 1963), relating to sup-

port of children born out of wedlock, were repealed by Sec. 31, Chapter 512, Laws 1975.



## CHAPTER 3001

### MONTANA RULES OF APPELLATE CIVIL PROCEDURE

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#### I. APPLICABILITY OF RULES

##### Rule

1. Scope of rules—From what judgment or order an appeal may be taken.
2. What the court may review on an appeal from a judgment.
3. Suspension of the rules.

#### II. APPEALS FROM JUDGMENTS AND ORDERS OF DISTRICT COURTS

4. How taken.
  - (a) FILING THE NOTICE OF APPEAL.
  - (b) JOINT APPEALS.
  - (c) CONTENT OF THE NOTICE OF APPEAL.
  - (d) SERVICE OF NOTICE OF APPEAL.
5. Time for filing notice of appeal.
6. Undertaking for costs on appeal.
  - (a) [FORM OF UNDERTAKING—TIME FOR FILING.]
7. Stay of judgment or order pending appeal.
  - (a) [STAY UPON ENTRY OF JUDGMENT—UNDERTAKING.]
  - (b) [SALE OF PERISHABLE PROPERTY.]
  - (c) [CASES IN WHICH STAY OF PROCEEDINGS NOT ALLOWED.]
8. Sureties and their justification.
  - (a) [LIABILITY OF SURETY—ENFORCEMENT.]
  - (b) [JUSTIFICATION OF SURETIES.]
9. The record on appeal.
  - (a) COMPOSITION OF THE RECORD ON APPEAL.
  - (b) THE TRANSCRIPT OF PROCEEDINGS—DUTY OF APPELLANT TO ORDER—NOTICE TO RESPONDENT IF PARTIAL TRANSCRIPT IS ORDERED—COSTS OF PRODUCING.
  - (c) STATEMENT OF THE EVIDENCE OR PROCEEDINGS WHEN NO REPORT WAS MADE OR WHEN THE TRANSCRIPT IS UNAVAILABLE.
  - (d) AGREED STATEMENT AS THE RECORD ON APPEAL.
  - (e) CORRECTION OR MODIFICATION OF THE RECORD.
  - (f) [FINDINGS OF FACT AND CONCLUSIONS OF LAW.]
10. Transmission of the record.
  - (a) TIME FOR TRANSMISSION—NUMBER OF COPIES OF TRANSCRIPT—DUTY OF APPELLANT.



## **RULES OF APPELLATE CIVIL PROCEDURE**

### **Rule**

- (b) DUTY OF CLERK TO TRANSMIT THE RECORD.
  - (c) EXTENSION OF TIME FOR TRANSMISSION OF THE RECORD—REDUCTION OF TIME.
  - (d) RETENTION OF THE RECORD IN THE DISTRICT COURT BY ORDER OF COURT.
  - (e) STIPULATION OF PARTIES THAT PARTS OF THE RECORD BE RETAINED IN THE DISTRICT COURT.
  - (f) RECORD FOR PRELIMINARY HEARING IN THE SUPREME COURT.
11. Docketing the appeal—Filing of the record.
- (a) DOCKETING THE APPEAL.
  - (b) FILING OF THE RECORD.
  - (c) DISMISSAL FOR FAILURE OF APPELLANT TO CAUSE TIMELY TRANSMISSION OR TO DOCKET APPEAL.
12. Effect of dismissal.
13. Acts of executors, administrators or guardians valid when appointment vacated.
14. Ruling against respondent may be reviewed.
15. Remedial powers of the supreme court.
16. Remittitur must be certified to the clerk of the district court.

## **III. ORIGINAL PROCEEDINGS—EXTRAORDINARY WRITS**

17. Acceptance and manner of conducting.
- (a) WHEN ACCEPTED.
  - (b) HOW COMMENCED AND CONDUCTED.
  - (c) APPLICATIONS—WHEN FILED.
  - (d) APPLICATIONS—WHAT TO CONTAIN.
  - (e) APPLICATIONS—HOW AND WHEN PRESENTED.
  - (f) ISSUANCE OF ALTERNATIVE WRIT OR ORDER TO SHOW CAUSE.
  - (g) BRIEFS.
  - (h) HEARING—WHEN HAD.

## **IV. APPEALS IN FORMA PAUPERIS**

18. Applications and manner of proceeding.
- (a) APPLICATION TO DISTRICT COURT.
  - (b) APPLICATION TO THE SUPREME COURT.
  - (c) FORM OF BRIEFS, APPENDICES AND OTHER PAPERS.

## **V. GENERAL PROVISIONS**

19. Record of commissions and oaths.
- (a) COMMISSIONS AND OATHS.
  - (b) MINUTES OF COURT.

## RULES OF APPELLATE CIVIL PROCEDURE

### Rule

#### 20. Filing and service.

- (a) FILING.
- (b) SERVICE OF ALL PAPERS REQUIRED.
- (c) MANNER OF SERVICE.
- (d) PROOF OF SERVICE.

#### 21. Computation and extension of time.

- (a) COMPUTATION OF TIME.
- (b) EXTENSION OF TIME.
- (c) ADDITIONAL TIME AFTER SERVICE BY MAIL.

#### 22. Motions.

#### 23. Briefs.

- (a) BRIEF OF THE APPELLANT.
- (b) BRIEF OF THE RESPONDENT.
- (c) REPLY BRIEF.
- (d) REFERENCES IN BRIEFS TO PARTIES.
- (e) REFERENCES IN BRIEFS TO THE RECORD.
- (f) REPRODUCTION OF STATUTES, RULES, REGULATIONS, ETC.
- (g) LENGTH OF BRIEFS AND COSTS.
- (h) BRIEFS IN CASES INVOLVING CROSS APPEALS.

#### 24. Brief of an amicus curiae.

#### 25. The appendix to the briefs.

- (a) USE OF AN APPENDIX.
- (b) CONTENTS OF THE APPENDIX.
- (c) ARRANGEMENT OF THE APPENDIX.
- (d) REPRODUCTION OF EXHIBITS.

#### 26. Filing and service of briefs.

- (a) TIME FOR FILING BRIEFS.
- (b) NUMBER OF COPIES TO BE FILED AND SERVED.
- (c) CONSEQUENCES OF FAILURE TO FILE BRIEFS.

#### 27. Form of briefs, the appendix, motions and other papers.

- (a) FORM OF BRIEFS, APPENDICES AND SEPARATE VOLUMES OF EXHIBITS.
- (b) TYPEWRITTEN PAPERS AND MOTIONS.
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#### 28. Prehearing conference.

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- (a) NOTICE OF HEARING—POSTPONEMENT.
- (b) TIME ALLOWED FOR ARGUMENT.
- (c) ORDER AND CONTENT OF ARGUMENT.
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## RULES OF APPELLATE CIVIL PROCEDURE

### Rule

- (e) NONAPPEARANCE OF COUNSEL—FAILURE TO FILE BRIEFS.
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30. Entry and notice of orders and judgments.
- (a) ENTRY AND NOTICE.
31. Interest on judgments.
32. Damages for appeal without merit.
33. Costs.
- (a) COSTS ON APPEAL.
  - (b) COSTS OF BRIEFS AND APPENDICES.
  - (c) OTHER COSTS TAXABLE.
  - (d) COSTS IN ORIGINAL PROCEEDINGS.
  - (e) UNNECESSARY COSTS.
  - (f) NOTATION BY CLERK.
34. Petitions for rehearing.
35. Notice and copy of decision—Remittitur—Mandate from United States supreme court.
- (a) NOTICE AND COPY OF DECISION TO BE FURNISHED.
  - (b) REMITTITUR—WHEN ISSUED—WHEN COPY OF OPINION TO ACCOMPANY.
  - (c) MANDATE FROM UNITED STATES SUPREME COURT—PROCEDURE THEREON.
36. Voluntary dismissal.
37. Substitution of parties.
- (a) DEATH OF A PARTY.
  - (b) SUBSTITUTION FOR OTHER CAUSES.
  - (c) PUBLIC OFFICERS—DEATH OR SEPARATION FROM OFFICE.
38. Cases involving constitutional questions where the state is not a party.
39. Calendar—Withdrawal of records.
- (a) PLACING CAUSES UPON CALENDAR.
  - (b) SETTING CAUSES FOR ARGUMENT.
  - (c) ADVANCEMENT OF CAUSES.
  - (d) PERMISSION TO TAKE RECORD FROM CLERK'S OFFICE.
40. Appeals from injunction orders.
41. Statutes and rules amended.



**Rule****42. Applicability in general.**

- (a) SPECIAL STATUTORY PROCEEDINGS.
- (b) APPEALS TO DISTRICT COURTS.
- (c) RULES INCORPORATED INTO STATUTES.

**43. Title—Effective date—Statutes superseded.**

- (a) TITLE.
- (b) EFFECTIVE DATE AND APPLICATION TO PENDING PROCEEDINGS.
- (c) STATUTES AND RULES SUPERSEDED.

**Appendix of forms.****Table A. List of statutes and rules superseded or amended.**

- B. List of rules of appellate civil procedure superseding, in whole or in part, or amending, statutes and rules.
- C. List of statutes and rules superseded, in whole or in part, or amended, by designated rules of appellate civil procedure.

**I. APPLICABILITY OF RULES**

- Rule 1. Scope of rules—From what judgment or order an appeal may be taken.
- 2. What the court may review on an appeal from a judgment.
- 3. Suspension of the rules.

**Rule 1. Scope of rules—From what judgment or order an appeal may be taken.**

These rules govern procedure in appeals in civil cases to the supreme court of Montana from Montana district courts and original proceedings in the supreme court of Montana. The party applying for original relief is known as the petitioner and the adverse party as the defendant. The party appealing is known as the appellant, and the adverse party as the respondent.

A party aggrieved may appeal from a judgment or order, **except when** expressly made final by law, in the following cases:

(a) From a final judgment entered in an action or special proceeding commenced in a district court, or brought into a district court from another court or administrative body.

(b) From an order granting a new trial; or refusing to permit an action to be maintained as a class action; or granting or dissolving an injunction; or refusing to grant or dissolve an injunction; or dissolving or refusing to dissolve an attachment; from an order changing or refusing to change the place of trial when the county designated in the complaint is not the proper county; from an order appointing or refusing to appoint a receiver, or giving directions with respect to a receivership, or refusing to vacate an order appointing or affecting a receiver; from an order directing the delivery, transfer, or surrender of property; from any special order made after final judgment; and from such interlocutory judg-

ments or orders, in actions for partition as determine the rights and interests of the respective parties and direct partition to be made. In any of the cases mentioned in this subdivision the supreme court, or a justice thereof, may stay all proceedings under the order appealed from, on such conditions as may seem proper.

(c) From a judgment or order granting or refusing to grant, revoking or refusing to revoke, letters testamentary, or of administration, or of guardianship; or admitting or refusing to admit a will to probate, or against or in favor of the validity of a will, or revoking or refusing to revoke the probate thereof; or against or in favor of setting apart property, or making an allowance for a widow or child; or against or in favor of directing the partition, sale, or conveyance of real property, or settling an account of an executor, or administrator, or guardian; or refusing, allowing, directing the distribution or partition of any estate, or any part thereof, or the payment of a debt, claim, legacy, or distributive share; or confirming or refusing to confirm a report of an appraiser setting apart a homestead.

All questions raised on an order overruling a motion for a new trial or on an order changing or refusing to change the place of trial under R. C. M. 1947, section 93-2906 subdivisions 2, 3 or 4 thereof may be raised and reviewed on an appeal from the judgment.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### Amendments

The amendment of September 29, 1967, in clause (b), inserted "or refusing to permit an action to be maintained as a class action;" near the beginning of the first sentence.

#### Advisory Committee's Note

Section 93-8003, R. C. M. 1947, is restated and clarified. The effect of section 93-8004 (3), referring to "an order changing or refusing to change a place of trial," is limited by providing for appeals from orders re change of venue only in cases where the motion for change is based upon subdivision 1 of section 93-2906.

Since these rules only apply to appeals from district courts to the Montana supreme court, the provisions of sections 93-8001 and 93-8002 are not superseded in so far as they refer to appeals in actions in police or justice's courts: a judgment or order in a civil action in police or justice's courts, except when expressly made final, may be reviewed as prescribed in R. C. M. 1947, sections 93-7901 to 93-7908.

#### Advisory Committee's Note to September 29, 1967 Amendment

Source: None.

This adds to appealable orders an order under Rule 23(c)(1), Montana Rules of Civil Procedure, refusing to permit a class

action to be maintained as such. It does not permit appeal from an order permitting a class action to be maintained as such. See Advisory Committee's Note to Rule 23 of the Montana Rules of Civil Procedure.

#### Class Action

Writ of supervisory control granting relief from district court order permitting maintenance of class action was not justified since the order was subject to alteration or amendment as the matter progresses and since the question can be considered on appeal from final judgment. *State ex rel. Anaconda Aluminum Co. v. District Court*, 158 M 228, 490 P 2d 351.

#### Denial of Change of Venue

Specification of error arising from trial court's order denying motion for change of venue was not properly before supreme court because timely appeal was not made from order as required by rules. *Sealey v. Majerus*, 149 M 268, 425 P 2d 70.

#### Denial of Motion

Where district court exceeded its jurisdiction in denying motion to quash summons and dismiss action where the summons had not been served and returned within the three years required by M. R. Civ. P., Rule 41(e) the order was not appealable under this rule. *State ex rel. Belwin, Inc. v. Davison*, 148 M 345, 420 P 2d 842, 844.

Writ of supervisory control was proper where lessor's motion to dismiss sub-

lessees' action for breach of lease agreement, to which sublessees were not parties, was denied by the district court, the order denying the motion to dismiss not being appealable under this rule. *State ex rel. Buttrey Foods, Inc. v. District Court*, 148 M 350, 420 P 2d 845, 847.

#### Denial of Writ of Assistance

Although denial of writ of assistance, placing purchaser at sheriff's sale under mortgage foreclosure into possession of lands involved, by district court was appealable under rule either as "an order directing \* \* \* surrender of property" or as "any special order made after final judgment," writ of supervisory control to compel the district court to issue writ of assistance was available as remedy since remedy by appeal was neither speedy nor adequate. *State ex rel. Foss v. District Court, Fourth Judicial District*, 152 M 73, 446 P 2d 707.

#### Dismissal of Action

The effect of a district court's order dismissing the action was substantially the same as a judgment for defendants and therefore appealable even though no formal judgment was entered. *Prentice Lumber Co. v. Hukill*, — M —, 504 P 2d 277, distinguishing *Payne v. Mountain States Telephone & Telegraph Co.*, 142 M 406, 385 P 2d 100, and *Rambur v. Diehl Lumber Co.*, 143 M 432, 391 P 2d 1; *Beach v. Destination Enterprises, Inc.*, — M —, 526 P 2d 1382.

#### Order Denying Summary Judgment

Although order denying summary judgment

is nonappealable at time it is made because of its interlocutory character, it is nonetheless reviewable under appellate rule providing that all nonappealable intermediate orders or decisions properly excepted or objected to which involve merits or necessarily affect judgment are reviewable on subsequent appeal from final judgment. *Brown v. Midland Nat. Bank*, 150 M 422, 435 P 2d 878.

#### Order Vacating Summary Judgment

Order vacating summary judgment is interlocutory order, not final judgment, and is not an appealable order. *Stensvad v. Montana Nat. Bank*, — M —, 541 P 2d 768.

#### Standing As Aggrieved Party

Appellant, who first raised issue of the zoning classification of property involved in condemnation proceeding, lacked standing as "a party aggrieved" to complain of the state's subsequent emphasis on the zoning of the property as misleading jury into reaching erroneous verdict. *State Highway Commission v. Vaughn*, 155 M 277, 470 P 2d 967.

#### Writ of Supervisory Control

Although orders of district court striking two defenses from relator's answer and granting plaintiff summary judgment on issue of liability were not directly appealable under this section, writ of supervisory control was available as remedy. *State ex rel. Great Falls Nat. Bank v. District Court*, 154 M 336, 463 P 2d 326.

### DECISIONS UNDER FORMER LAW

#### Dismissal of Action

An order granting a motion to dismiss was not appealable under former section 93-8003. *Payne v. Mountain States Telephone & Telegraph Co.*, 142 M 406, 385 P 2d 100; *Rambur v. Diehl Lumber Co.*, 143 M 432, 391 P 2d 1; both distinguished in 161 M 8, 504 P 2d 277, 279.

#### Injunctions and Restraining Orders

Order denying county commissioner's motion to quash temporary injunction against use of real property valuations made by private appraisal group and relied on by reclassification officer appointed by commissioners to determine 1965 tax assessment rolls was appealable under

former section 93-8003. *State ex rel. Keast v. Krieg*, 145 M 521, 402 P 2d 405, 19 ALR 3d 396, overruled on other grounds in — M —, 534 P 2d 854.

#### Sustaining of Demurrer

Notwithstanding that former statute providing for appeals gave party against whom demurrer was sustained plain and speedy remedy by appeal, court would not dismiss application for supervisory writ where judgment sustaining demurrer also stayed proceedings and expressly accorded losing party right to apply for supervisory writ. *State ex rel. Cave Constr. Co. v. District Court, Third Judicial District*, 150 M 18, 430 P 2d 624.

### Rule 2. What the court may review on an appeal from a judgment.

Upon appeal from a judgment, the court may review the verdict or decision, and any intermediate order or decision excepted or objected to within the meaning of Rule 46 of the Montana Rules of Civil Procedure,



which involves the merits, or necessarily affects the judgment, except a decision or order from which an appeal might have been taken.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

#### **Advisory Committee's Note**

This rule incorporates R. C. M. 1947, section 93-8022.

#### **Correction of Erroneous Judgment**

Case would be remanded to district court for purpose of amending, by incorporating appropriate terms, a judgment which omitted defaulting codefendant who was jointly and severally liable on obligation. *White v. Nollmeyer*, 151 M 387, 443 P 2d 873.

#### **Denial of Change of Venue**

Specification of error arising from trial court's order denying motion for change of venue was not properly before supreme court because timely appeal was not made from order as required by rules. *Sealey v. Majerus*, 149 M 268, 425 P 2d 70.

#### **Objections First Raised on Appeal**

In condemnation proceedings by the state highway commission to condemn a

right of way for an interstate highway which divided ranch into two large tracts making an underpass necessary, alleged error of trial court in its preliminary order of condemnation of ordering commission at its own expense to install, construct and maintain the underpass on the ground that the commission had previously agreed to install the underpass, could not be raised for the first time on appeal where the question was not raised at the time of the trial in the lower court. *State ex rel. State Highway Commission v. Wheeler*, 148 M 246, 419 P 2d 492, 496.

#### **Order Denying Summary Judgment**

Although order denying summary judgment is nonappealable order at time it is made because of its interlocutory character, it is nonetheless reviewable under appellate rule providing that all nonappealable intermediate orders or decisions properly excepted or objected to which involve merits or necessarily affect the judgment are reviewable on subsequent appeal from final judgment. *Brown v. Midland Nat. Bank*, 150 M 422, 435 P 2d 878.

### **Rule 3. Suspension of the rules.**

In the interest of expediting decision upon any matter before it, or for other good cause shown, the supreme court may, except as otherwise provided in Rule 21(b), suspend the requirements or provisions of these rules on application of a party or on its own motion and may order proceedings in accordance with its direction.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

#### **Advisory Committee's Note**

This rule is taken from Rule 2 of the Federal Draft. Its purpose is explained by the Federal Advisory Committee's Note. Adjusted to state practice, this purpose is to make clear the power of the supreme court to expedite the determination of cases of pressing concern to the public or to the litigants by prescribing a time schedule other than that provided by the rules. The rule also contains a general authorization to the supreme court to relieve litigants of the conse-

quences of default where manifest injustice would otherwise result. Rule 21(b) prohibits the supreme court from extending the time for taking appeal.

#### **Emergency Restraining Order Denied**

Petition by female minor who was denied injunction prohibiting rodeo from refusing to allow her to participate as a bare-back bronc rider, was not such an emergency as to invoke the extraordinary remedies of the supreme court, ex parte, without notice, without bond, and without hearing. *State ex rel. Reno v. District Court*, — M —, 529 P 2d 1407.

## **II. APPEALS FROM JUDGMENTS AND ORDERS OF DISTRICT COURTS**

- Rule 4.** How taken.  
 5. Time for filing notice of appeal.  
 6. Undertaking for costs on appeal.  
 7. Stay of judgment or order pending appeal.  
 8. Sureties and their justification.  
 9. The record on appeal.  
 10. Transmission of the record.

11. Docketing the appeal—Filing of the record.
12. Effect of dismissal.
13. Acts of executors, administrators or guardians valid when appointment vacated.
14. Ruling against respondent may be reviewed.
15. Remedial powers of the supreme court.
16. Remittitur must be certified to the clerk of the district court.

#### Rule 4. How taken.

(a) **FILING THE NOTICE OF APPEAL.** An appeal shall be taken by filing a notice of appeal in the district court. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the supreme court deems appropriate, which may include dismissal of the appeal.

(b) **JOINT APPEALS.** If two or more persons are entitled to appeal from a judgment or order of the district court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate notices of appeal as a single appellant.

(c) **CONTENT OF THE NOTICE OF APPEAL.** The notice of appeal shall specify the party or parties taking the appeal; and shall designate the judgment or order appealed from. Form 1 in the Appendix of Forms is a suggested form of notice of appeal.

(d) **SERVICE OF NOTICE OF APPEAL.** The clerk of the district court shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record of each party other than the appellant, or, if a party is not represented by counsel, to the party at his last known address, and shall mail a copy of the notice of appeal to the clerk of the supreme court. The clerk of the district court shall note on each copy served the date on which the notice of appeal was filed. If an appellant is represented by counsel, his counsel shall provide the clerk with sufficient copies of the notice of appeal to permit the clerk to comply with the requirements of this rule. Failure of the clerk to serve notice shall not affect the validity of the appeal. The notice shall be sufficient notwithstanding the death of a party or his counsel. The clerk shall note in the docket the names of the parties to whom he mails copies, with the date of mailing.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

#### Advisory Committee's Note

This rule is patterned after Rule 3 of the Federal Draft, but excludes references to criminal cases, habeas corpus proceedings and bankruptcy. Nothing other than the filing of a notice of appeal in the district court is required for the perfecting of an appeal. In the interest of providing the supreme court with prompt

notice that its jurisdiction has been invoked, the rule directs the clerk of the district court to forward a copy of the notice of appeal to the clerk of the supreme court. The requirement that the appellant furnish the clerk with the necessary number of copies of the notice of appeal and that the clerk endorse on each copy served the date on which the notice was filed are for the convenience of the clerk and litigants respectively.

#### DECISIONS UNDER FORMER LAW

##### Service on Respondent

Where notice of appeal was not served

on the respondent party within six months of the date of judgment, the su-

preme court could not acquire jurisdiction even though notice was filed with the district court within the statutory period. *Seiffert v. Police Commission of Helena*, 144 M 52, 394 P 2d 172.

### Rule 5. Time for filing notice of appeal.

The time within which an appeal from a judgment or an order must be taken shall be 30 days from the entry thereof, except that in cases where service of notice of entry of judgment is required by Rule 77(d) of the Montana Rules of Civil Procedure the time shall be 30 days from the service of notice of entry of judgment, but if the state of Montana, or any political subdivision thereof, or an officer or agency thereof is a party the notice of appeal shall be filed within 60 days from the entry of the judgment or order or 60 days from the service of notice of the entry of judgment. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 7 days of the date on which the first notice of appeal was filed, or within the time otherwise provided by this rule, whichever period last expires.

The running of the time for filing a notice of appeal is suspended as to all parties by a timely motion filed in the district court by any party pursuant to the Montana Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this rule commences to run and is to be computed from mailing by the clerk of notice of the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59.

Upon showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the original time prescribed by this rule.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### Amendments

The amendment of September 29, 1967, in the first sentence of the first paragraph, inserted "a judgment or" before "an order"; substituted "except that \* \* \* the time" for "and the time within which an appeal from a judgment must be taken"; deleted "as provided in Rule 77(d) of the Montana Rules of Civil Procedure" after "entry of judgment"; and inserted "or any political subdivision thereof" after "state of Montana."

#### Advisory Committee's Note

This rule is patterned after Rule 4 of the Federal Draft. (Provisions for appeals in bankruptcy, petitions for im-

peachment, under the Railway Labor Act, under the Interlocutory Appeals Act, and in criminal cases, are omitted.) It materially shortens the time for taking an appeal.

The Federal Draft provides that the notice of appeal shall be filed within 30 days "of the date of the entry of the judgment order appealed from." The change, which measures the time from service of notice of entry of the judgment, is for the purpose of avoiding uncertainty as to what is a judgment and reducing the possibility of lack of knowledge of the entry of the judgment or order.

The provision for added time for appeal by other parties after notice of appeal is filed by one party is new. The Federal Advisory Committee Note explains this as follows: "It not infrequently happens that a party considers himself aggrieved



by the final judgment but is willing to abide by it if it is to be the final result of the action. Such a party should be protected against the possibility that another party may file a final hour appeal and thereby oblige the forbearing party to undergo the expense of an appeal without the opportunity of presenting his own grievance" to the supreme court.

The time limit for taking an appeal would not prevent the taking of an appeal at any time after the entry of the judgment or order and before service of notice of entry.

The final paragraph permits an extension of the time for taking an appeal by the district court "upon a showing of excusable neglect." In view of the ease with which an appeal may be taken—the filing of a simple notice with the clerk of court—and the unlikelihood that there will not be actual notice of the entry of the judgment or order, it would be an extraordinary case which would justify an extension. But the district court should have the authority to extend time in extraordinary cases where injustice would otherwise result. The phrase "by any party" makes it clear that the district court may extend the time allowed for filing a cross or separate appeal after an initial appeal has been filed.

#### **Advisory Committee's Note to September 29, 1967 Amendment**

Source: None.

Since Rule 77(d), M. R. Civ. P., only requires service of notice of entry of judgment in cases where an appearance has been made, no time appears to be provided for filing notice of appeal from judgments in default cases. This amendment is designed to supply the deficiency.

The addition of the phrase, "or any political subdivision thereof," is added to make it clear that the 60-day provision applies to cities, counties, etc.

#### **Commencement of Sixty-Day Period**

Sixty-day allotted period in which to

file an appeal commenced to run the day after motion for new trial was deemed denied under the self-executing provision of Rule 59(d) which provides that a motion for a new trial which does not contain a notice of hearing and upon which no hearing is held is automatically denied ten days after service; district court clerk's letter mailed twenty-two days after service of notice stating that the motion for new trial had been denied had no effect on the commencement of the sixty-day period in which appellants had to file their appeal. *Leitheiser v. Montana State Prison*, 161 M 343, 505 P 2d 1203.

#### **Excusable Neglect**

Where appellant lived in semi-seclusion, communicated with her attorney through her daughter, informed attorney she did not wish to appeal, and then, after time for appeal had expired, decided she did want to appeal, this change of mind was not an extraordinary case for which extension of time to file appeal would be allowed. *McCormick v. McCormick*, — M —, 541 P 2d 765.

#### **Extension of Time**

Where district court granted appellant's petition for extension of time to appeal from judgment, the court had no jurisdiction to dismiss appellant's appeal upon subsequent finding that there was no cause for granting extension of time. *McCormick v. McCormick*, — M —, 541 P 2d 765.

#### **Filing Period Where State, Its Officer or Subdivision Is Party**

The sixty-day filing period for notices of appeal provided for in this rule where the state or one of its officers or subdivisions is a party applies whether it is the governmental entity or official who seeks to appeal or the other party. *Lewis-town Propane Co. v. Utility Builders Inc.*, — M —, 552 P 2d 1100.

### **Rule 6. Undertaking for costs on appeal.**

(a) [Form of undertaking—Time for filing]. Within 10 days after service of notice of appeal an undertaking for costs on appeal shall be filed in the district court, or a deposit of the money in the amount thereof be made with the clerk of the district court to abide the event of the appeal, or the undertaking be waived by the adverse party in writing. The undertaking must be executed on the part of the appellant by at least 2 sureties, or by a corporate surety as may be authorized by law, to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, or on the dismissal thereof, not exceeding five hundred dollars. If the undertaking on appeal is not filed

within the time specified, or if the undertaking filed is found insufficient, and if the action is not yet docketed with the supreme court, an undertaking may be filed at such time before the action is so docketed as may be fixed by the district court. After the action is so docketed, application for leave to file an undertaking may be made only in the supreme court. The undertaking for costs herein provided may be combined in a single document with a supersedeas bond under Rule 7.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

**Advisory Committee's Note**

Rules 7 and 8 of the Federal Draft contain provisions for appeal bonds and the stay of judgments and orders. These provisions are not followed in the rule. Rather Rules 6, 7 and 8 hereof are substituted. These provisions are believed to be more in accord with state practice and to better fit into Montana statutes

than do the provisions of the Federal Draft. This rule supersedes R. C. M. 1947, sections 93-8005, 93-8006, 93-8012, 93-8015, and compares with Federal Rule 73(c) and (e).

The amount of the undertaking has remained at \$300 since 1895, and the rule would increase it to \$500. Also, express provision is made for corporate sureties as may be authorized by law. Such authorization is found in R. C. M. 1947, section 93-8711.

**Rule 7. Stay of judgment or order pending appeal.**

(a) [Stay upon entry of judgment—Undertaking]. Upon entry of a judgment or order a party may apply to the district court on notice or ex parte for a stay of the execution of the judgment or order. The court in its discretion may grant said stay for such period of time and under such conditions as the court deems proper, including restraining the party from disposing of, encumbering, or concealing his property. Upon service of notice of appeal, if the court has made no such order or the appellant desires a stay for a longer period than ordered, he may present to the district court and secure its approval of a supersedeas bond which shall have such surety or sureties as are required for an undertaking for costs on appeal prescribed by Rule 6(a). The bond shall be conditioned for the satisfaction of the judgment or order in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment or order is affirmed, and to satisfy in full such modification of the judgment or order and such costs, interest, and damages as the supreme court may adjudge and award. When the judgment or order is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment or order remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the district court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond. When the judgment or order determines the disposition of property in controversy as in real actions, replevin, and actions to foreclose mortgages, or when such property is in the custody of the sheriff or when the proceeds of such property or a bond for its value is in the custody or control of the court, the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay. On application, the supreme court in the interest of justice may suspend, modify, restore, or grant any order made under this subdivision.



(b) [Sale of perishable property]. If the judgment or order appealed from directs the sale of perishable property, the district court may order the property to be sold and the proceeds thereof to be deposited, to abide the judgment of the supreme court.

(c) [Cases in which stay of proceedings not allowed]. No stay of proceedings shall be allowed upon a judgment or order which adjudges the defendant guilty of usurping, or intruding into, or unlawfully holding public office, civil or military, within this state; or which grants a writ of mandamus, or of prohibition, against a tribunal, corporation, public officer, or board, commanding certain acts to be done which ought to be done by such tribunal, corporation, public officer, or board, and not involving the payment or allowance of money or its equivalent.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

#### Advisory Committee's Note

This rule supersedes subdivisions (a) and (d) of Rule 62 of the Montana Rules of Civil Procedure. It also supersedes section 93-8013 in so far as applicable to appeals from district courts to the supreme court. However, since these rules do not apply to appeals from police and justices' courts, section 93-8013 is not superseded in so far as it provides that in cases where an undertaking is required on appeal by the provisions of sections 93-7901 to 93-7908, "a deposit in the court below of the amount of the judgment appealed from, and three hundred dollars in addition, shall be equivalent to filing the undertaking; and . . . the undertaking or deposit may be waived by the written consent of the respondent." Also section 93-8014 is superseded, and subdivision (c) of this rule is patterned after the last part of that section.

The provision of this rule that, upon entry of a judgment or order a party may apply to the district court on notice or ex parte for a stay of execution, is designed to afford time to obtain a supersedeas bond during which the status quo is maintained by court order. The power of the supreme court recognized by the last sentence of subdivision (a) supplements the power of the district court.

#### Approval of Stay Bond

Order of the supreme court giving the

district court authority to approve bond for stay of judgment does not give district court any authority to dismiss appeal if bond is not filed. *Bryant Development Assn. v. Dagel*, — M —, 531 P 2d 1319.

#### Constitutional Power

Supreme court's constitutional power under 1889 Const., art. VIII, § 3, to issue writs necessary to the complete exercise of its appellate jurisdiction overrode the provision in subdivision (c) of this rule prohibiting stay of a writ of mandamus, and supreme court could stay a district court writ of mandamus ordering the superintendent of banks to issue a bank charter since a stay was necessary to make the right of appeal effectual. *State ex rel. Bennett v. Dowdall*, 157 M 11, 482 P 2d 572.

#### Supersedeas Bond

Failure of defendant to file supersedeas bond pursuant to this section resulted in dismissal of appeals since such bond is only method to stay execution of judgment and after judgment is paid, it passes beyond review. *Gallatin Trust & Savings Bank v. Henke*, 154 M 170, 461 P 2d 448, distinguished in — M —, 539 P 2d 722.

An application for reduction in the amount of a supersedeas bond should be submitted to the district court that set the amount. *State ex rel. Adams v. District Court of Ninth Judicial District in and for County of Teton*, 155 M 309, 471 P 2d 537.

### DECISIONS UNDER FORMER LAW

#### Eminent Domain Proceeding

Where state highway commission filed notice of appeal and perfected its appeal after writ of execution under section 93-9918 had issued, the appeal stayed the

judgment although no bond was filed as required by this section, since under Rule 62(e), no security was required from the state. *Robertson v. State Highway Commission*, 148 M 275, 420 P 2d 21, 24.

### Rule 8. Sureties and their justification.

(a) [Liability of surety—Enforcement]. In cases where an undertaking on appeal or supersedeas bond with sureties is required, the pro-



visions of R. C. M. 1947, sections 93-8710 to 93-8715, inclusive, apply. By entering into an undertaking on appeal or supersedeas bond given pursuant to Rules 6 and 7, the surety submits himself to the jurisdiction of the district court and irrevocably appoints the clerk of the district court as his agent upon whom papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of any independent action. The motion and such notice of the motion as the district court prescribed may be served on the clerk of that court, who shall forthwith mail copies to each surety whose address is known.

(b) [Justification of sureties]. A party may except to the sufficiency of the sureties to any bond or undertaking mentioned in this rule at any time within 30 days after the filing of such bond or undertaking; and unless they or other sureties, within 20 days after service of notice of such exception, justify before a judge of the district court, or the clerk thereof, upon 5 days' notice to the other parties of the time and place of justification, execution of the judgment or order appealed from is no longer stayed.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

#### Advisory Committee's Note

The provisions of subdivision (a) of the rule with respect to proceedings against sureties is patterned after Rule 8(b) of the Federal Draft. Subdivision (b) of the rule follows the existing Mon-

tana practice provided by R. C. M. 1947, section 93-8013, but the language is changed to avoid confusion where there are cross appeals or mixed forms of relief and to make it clear that either appellant or respondent, or both, may except to the sufficiency of sureties on a bond or undertaking furnished by the other.

### Rule 9. The record on appeal.

(a) COMPOSITION OF THE RECORD ON APPEAL. The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases.

(b) THE TRANSCRIPT OF PROCEEDINGS—DUTY OF APPELLANT TO ORDER—NOTICE TO RESPONDENT IF PARTIAL TRANSCRIPT IS ORDERED—COSTS OF PRODUCING. Within 10 days after filing the notice of appeal the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record. In all cases where the appellant intends to urge insufficiency of the evidence to support the verdict, order or judgment in the district court, it shall be the duty of the appellant to order the entire transcript of the evidence. Wherever the sufficiency of the evidence to support a special verdict or answer by a jury to an interrogatory, or to support a specific finding of fact by the trial court, is to be raised on the appeal by the appellant, he shall be under a duty to include in the transcript all evidence relevant to such verdict, answer or finding. Unless the entire transcript is to be included, the appellant shall, within the time above provided, file and serve on the respondent a description of the parts of the transcript which he intends to include in the record and a statement of the issues which he intends to present on the appeal. If the respondent deems a transcript of other

parts of the proceedings to be necessary he shall within 10 days after such filing and service order such parts from the reporter or procure an order from the district court requiring the appellant to so do.

The cost of producing the transcript shall be paid by the appellant, or he shall make satisfactory arrangements with the reporter for the payment of such cost; but, if the appellant considers that any part of the record designated by the respondent for inclusion is unnecessary for the determination of the issues presented, he shall advise the respondent, and the district court may impose upon the respondent the cost of producing any part which it deems unnecessary for the determination of the issues.

The reporter shall certify the correctness of the transcript.

(c) STATEMENT OF THE EVIDENCE OR PROCEEDINGS WHEN NO REPORT WAS MADE OR WHEN THE TRANSCRIPT IS UNAVAILABLE. If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may, within 10 days from the hearing or trial or such time extended as the district court may for good cause shown permit, prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be served on the respondent, who may serve objections or propose amendments thereto within 10 days after service. Thereupon, the statement and any objections or proposed amendments shall be submitted for settlement and approval to the district judge who handled the proceedings, and as settled and approved shall be included by the clerk of the district court in the record on appeal. A judge may settle and approve such record after he ceases to be a judge. If such judge before the statement is settled and approved dies, is removed from office, becomes disqualified, is absent from the state, or refuses to settle and approve the statement, it shall be settled and approved in such manner as the supreme court may direct.

(d) AGREED STATEMENT AS THE RECORD ON APPEAL. In lieu of the record on appeal as defined in subdivision (a) of this rule, the parties may prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the district court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with such additions as the court may consider necessary fully to present the issues raised by the appeal, shall be approved by the district court and shall then be certified to the supreme court as the record on appeal and transmitted thereto by the clerk of the district court within the time provided by Rule 10. Copies of the agreed statement may be filed as the appendix required by Rule 25.

(e) CORRECTION OR MODIFICATION OF THE RECORD. If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court,



either before or after the record is transmitted to the supreme court, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the supreme court.

(f) [FINDINGS OF FACT AND CONCLUSIONS OF LAW.] In all nonjury cases where judgment is rendered on the basis of findings of fact and conclusions of law such findings and conclusions by the district court should be incorporated in the appendix to appellant's brief, along with the district court's opinion, if any.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-10, Oct. 22, 1971, eff. Jan. 1, 1972.

#### **Amendments**

The 1971 amendment added subdivision (f).

#### **Advisory Committee's Note**

This rule is patterned after Rule 10 of the Federal Draft.

Subdivision (a). This subdivision provides for the use of the original trial record as the official record on appeal, and judgment rolls are nowhere provided for in these Rules. This use of the trial record is now provided for in all federal circuit courts.

Subdivision (b). The Federal Advisory Committee's Note states: "The appellant is required to serve a statement of the issues which he intends to present on appeal if only a part of the proceedings is transcribed solely to allow the appellee to determine whether the partial transcript will be adequate for the determination of the issues presented by the appeal. Such a statement is not the equivalent of an assignment of errors, which is nowhere required in the proposed rules, and the statement would not result in limiting the issues on appeal. The precise statement of the issues presented by the appeal is to be made in the brief. An appellee who can show that he was misled by the statement required by this subdivision and in consequence failed to designate for transcription material parts of the reported proceedings may seek relief under subdivision (e) of this rule."

The second and third sentences of this subdivision following the title are added to the Federal Draft to make the duty which rests on the appellant more specific. Also, the second paragraph of this subdivision has been expanded to afford protection to an appellant against payment of costs of a transcript of unnecessary portions of the proceeding ordered

by a respondent. And the last paragraph, requiring the reporter to certify the correctness of the transcript, has been added to the Federal Draft.

Subdivision (c). The provision of the Federal Draft for settlement has been expanded, patterned after section 93-5508; also, because memories are short, there has been added a time limit for the preparation of the statement.

Subdivisions (d) and (e) are the same as the provisions of the federal draft, adjusted to the Montana court system.

#### **Cost of Transcript**

Under rule providing that court "may impose upon the respondent the cost of producing any part of the record which it deems unnecessary for the determination of the issues," court determined that cost of portion of transcript ordered by respondent, which did not bear on any issue presented upon appeal, should be assessed against respondent. *Ratcliff v. Murphy*, 150 M 31, 430 P 2d 627.

#### **Failure to Perfect Appeal**

Appeal was dismissed where appellants had failed to request parts of the transcript within the time allowed by subdivision (b) of this rule, had not requested preparation of any portion of the record on appeal, had failed to pay for copies of documents requested or portions of the transcript prepared, had failed to transmit any part of the record on appeal to the supreme court, had failed to docket the appeal or pay the docket fee, and had failed, within the time allowed by the chief justice, to replace counsel desiring to withdraw with good cause. *Larry C. Iverson, Inc. v. United Bank of Pueblo*, 158 M 223, 490 P 2d 352.

Appeal was dismissed for inadequacy of record where there was no statement of the evidence and sufficiency of evidence was in issue, even though appellant contended that only an issue of law was presented. *Washington v. Washington*, 161 M 516, 507 P 2d 1071.



## DECISIONS UNDER FORMER LAW

**Evidence Not in Record**

Merits of appeal could not be determined where purported transcript on appeal did not contain certificate of judge that records included in the transcript had been used at the hearing. *Anderson v. Mennie*, 144 M 105, 394 P 2d 853, 854.

**Late Presentment of Bill**

A bill of exceptions presented after the time prescribed in former section 93-5505 was a nullity and could not be considered on appeal. *Anderson v. Mennie*, 144 M 105, 394 P 2d 853, 854.

**Notice of Appeal**

Where appellant sought to amend notice of appeal from a nonappealable order so as to make it an appeal from final judgment, the supreme court acquired no jurisdiction to allow such amendment when the statutory provisions for time and manner of appeal were not complied with. *Payne v. Mountain States Telephone & Telegraph Co.*, 142 M 406, 385 P 2d 100.

**Rule 10. Transmission of the record.**

(a) **TIME FOR TRANSMISSION—NUMBER OF COPIES OF TRANSCRIPT—DUTY OF APPELLANT.** The record on appeal, including the transcript necessary for the determination of the appeal, shall be transmitted to the supreme court within 40 days after the filing of the notice of appeal unless the time is shortened or extended by an order entered under subdivision (c) of this rule. Six copies of each transcript must be lodged with the clerk of this court for filing. Promptly after filing the notice of appeal the appellant shall comply with the provisions of Rule 9(b) and shall take any other action necessary to enable the clerk to assemble and transmit the record. If more than one appeal is filed, each appellant shall comply with the provisions of Rule 9(b) and this subdivision, and a single record shall be transmitted within 40 days after the filing of the final notice of appeal.

(b) **DUTY OF CLERK TO TRANSMIT THE RECORD.** When the record is complete for purposes of the appeal, the clerk of the district court shall transmit it to the clerk of the supreme court. The clerk shall number the documents comprising the record and shall transmit with the record a numbered list of the documents, identifying each with reasonable definiteness. Documents in bulky containers and physical exhibits other than documents shall not be transmitted by the clerk unless he is directed to do so by a party or by the clerk of the supreme court. A party must make advance arrangements with the clerk of the district court for the transportation of bulky or weighty exhibits and with the clerk of the supreme court for their receipt. Transmission of the record is effected when the clerk of the district court mails or otherwise forwards the record to the supreme court. The clerk of the district court shall indicate, by endorsement on the face of the record or otherwise, the date upon which it is transmitted to the supreme court.

(c) **EXTENSION OF TIME FOR TRANSMISSION OF THE RECORD—REDUCTION OF TIME.** The district court may extend the time for transmitting the record. The request for extension must be made within the time originally prescribed or within an extension previously granted, and the district court shall not extend the time to a day more than 90 days from the date of filing of the first notice of appeal. If the district court is without authority to grant the relief sought or has

denied a request therefor, the supreme court may on motion extend the time for transmitting the record or may permit the record to be transmitted and filed after the expiration of the time allowed or fixed. A motion for an extension of time for transmitting the record made in either court shall show that the inability of the appellant to cause timely transmission of the record is due to causes beyond his control or to circumstances which may be deemed excusable neglect. If a request for an extension of time for transmitting the record has been previously denied, the motion shall set forth the denial and shall state the reasons therefor, if any were given.

The district court or the supreme court may require the record to be transmitted and the appeal to be docketed at any time within the time otherwise fixed or allowed therefor.

(d) **RETENTION OF THE RECORD IN THE DISTRICT COURT BY ORDER OF COURT.** The supreme court may provide by rule or order that a certified copy of the docket entries shall be transmitted in lieu of the entire record, subject to the right of any party to request at any time during the pendency of the appeal that designated parts of the record be transmitted.

If the record is required in the district court for use there pending the appeal, the district court may make an order to that effect, and the clerk of the district court shall retain the record and shall transmit a copy of the order and of the docket entries together with such parts of the original record as the district court shall allow and copies of such parts as the parties may designate.

If the record is retained in the district court by order of either court, the clerk of the district court shall retain it subject to the order of the supreme court, and transmission of the copy of the docket entries shall constitute transmission of the record.

(e) **STIPULATION OF PARTIES THAT PARTS OF THE RECORD BE RETAINED IN THE DISTRICT COURT.** The parties may agree by written stipulation filed in the district court that designated parts of the record shall be retained in the district court unless thereafter the supreme court shall order or any party shall request their transmittal. The parts thus designated shall nevertheless be a part of the record on appeal for all purposes.

(f) **RECORD FOR PRELIMINARY HEARING IN THE SUPREME COURT.** If prior to the time the record is transmitted a party desires to make in the supreme court a motion for dismissal, for a stay pending appeal, for additional security on the undertaking on appeal or on a supersedeas bond, or for any intermediate order, the clerk of the district court at the request of any party shall transmit to the supreme court such parts of the original record as the party shall designate.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

**Advisory Committee's Note**

This rule is taken from Rule 11 of the Federal Draft.

Subdivision (a). This subdivision fixes the time for transmission rather than for filing at 40 days after the filing of the notice of appeal, thus enabling the parties to know with certainty precisely when the complete record must be transmitted to

the supreme court. The only justification for delay between filing the notice of appeal and the transmission of the record to the supreme court is the time required for securing a transcription of the trial proceedings. If the appellant is prevented from securing the necessary transcript within the 40-day period by circumstances beyond his control, he may seek an extension of time for transmitting the record.

The requirement that the appellant take any other action necessary to enable the clerk to assemble and transmit the record emphasizes the primary responsibility of the appellant for effecting timely transmission of the record. His responsibilities include, for example, the payment of any required fee or charge.

Subdivision (b). The appellant is allowed 40 days between the filing of the notice of appeal and the transmission of the record in order to allow him to secure the necessary transcript. If the transcript is available sooner, the allowance is unnecessary, and either party may oblige the clerk of the district court to transmit the record forthwith. On the other hand, unless the record contains the necessary transcript, the clerk is not to transmit it.

Subdivision (c). Cause for extension of the time by either the district or the supreme court must be shown. The final sentence permits any party to expedite the appeal in cases in which the record is complete by obtaining an order that the record be transmitted and the appeal docketed at a date earlier than otherwise allowed or fixed.

Subdivision (d). This subdivision permits the record to be retained in the district court by order of the supreme court, or order of the district court subject to the order of the supreme court. Especially in cases where the judgment or order does not dispose of the entire litigation, retention of the record in the district court may be a convenience for counsel and the district court. In some cases there may be no need for the transmission of the record, and the labor and expense of transmission may be saved.

Subdivision (e). This subdivision permits parties to stipulate against transmission of designated parts of the record free from the fear that a mistake may substantially affect the scope of the appeal. The final sentence makes it clear that a stipulation that designated parts of the record not be transmitted in no way diminishes the record itself. In effect, a party may at any time revoke his stipulation against transmission of parts of the record.

Subdivision (f). The substance of this subdivision was taken from Fed. R. Civ. P., Rule 75(j).

### Dismissal of Appeal

Appeal was dismissed where appellants had not transmitted any part of the record on appeal within the time required by subdivision (a) of this rule, had not applied for an extension of time, had not requested parts of the transcript from the district court clerk within the time allowed, had not requested preparation of any part of the record on appeal, had not paid for copies of documents requested or portions of the transcript prepared, had not docketed the appeal or paid the docket fee, and had failed, within the time allowed by the chief justice, to replace counsel desiring to withdraw with good cause. *Larry C. Iverson, Inc. v. United Bank of Pueblo*, 158 M 223, 490 P 2d 352.

### Enforcement of Rule

Supreme Court refused to dismiss appeal for failure to file record within time limit where appellant-defendant had been granted the appellant over 130 days in the record, but through error of defendant or district court, the order granted a ninety-day extension for filing which to file record and where appellant at the end of that period moved for a thirty-day extension which was granted and on the day of that motion filed the record. *Hannifin v. Retail Clerks International Assn.*, — M —, 511 P 2d 982.

## Rule 11. Docketing the appeal—Filing of the record.

(a) DOCKETING THE APPEAL. Within the time allowed or fixed for transmission of the record, the appellant shall pay to the clerk of the supreme court the fee for filing the record on appeal fixed by section 82-503 of the 1947 Revised Codes of Montana, and the clerk shall thereupon enter the appeal upon the docket. If an appellant is authorized to prosecute the appeal without prepayment of fees, the clerk shall enter the appeal upon the docket at or before the time of filing the record. An appeal shall be docketed under the title given to the action



## Rule 11(b) RULES OF APPELLATE CIVIL PROCEDURE

in the district court with such addition as is necessary to indicate the identity of the appellant.

(b) **FILING OF THE RECORD.** Upon receipt of the record by the clerk of the supreme court following its timely transmittal, and after the appeal has been timely docketed, the clerk shall file the record. The clerk shall immediately give notice to all parties of the date on which the record was filed.

(c) **DISMISSAL FOR FAILURE OF APPELLANT TO CAUSE TIMELY TRANSMISSION OR TO DOCKET APPEAL.** If the appellant shall fail to cause timely transmission of the record or to pay the filing fee if a filing fee is required, any respondent may file a motion in the supreme court to dismiss the appeal. The motion shall be supported by a certificate of the clerk of the district court showing the date and substance of the judgment or order from which the appeal was taken, the date on which the notice of appeal was filed, and the expiration date of any order extending the time for transmitting the record; and by proof that 7 days' notice in writing has been served on the appellant that application will be made for dismissal of the appeal. The clerk shall docket the appeal for the purpose of permitting the court to entertain the motion, without requiring payment of the filing fee, but the appellant shall not be permitted to appear without payment of the fees unless he is otherwise exempt therefrom. Instead of filing a motion to dismiss the appeal, the respondent may cause the record to be transmitted and may docket the appeal, in which event the appeal shall proceed as if the appellant had caused it to be docketed.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

### **Advisory Committee's Note**

This rule is patterned after Rule 12 of the Federal Draft, with adjustments to state practice. The provision of section 82-503 for a fee for filing the "transcript" on appeal will apply to the "record" on appeal pursuant to these rules.

The appellant's responsibility with respect to docketing and filing are specified. The appellant may pay the filing fee at any time after filing the notice of appeal, and it is then the duty of the clerk of the supreme court to enter the appeal on the docket. The appellant's responsibility is (1) to pay the filing fee at or before the time allowed or fixed for transmission of the record, and (2) to insure that the record is transmitted to the supreme court within the time allowed or fixed for its transmission. The clerk of the su-

preme court is directed to assign to cases on appeal the title which was used in the district court in the interest of facilitating future reference and citation and location of cases in indexes.

### **Dismissal of Appeal**

Appeal was dismissed where appellants had failed to docket the appeal or pay the docket fee, had not requested parts of the transcript within the time allowed, had not requested preparation of any part of the record on appeal, had not paid for copies of documents requested or portions of the transcript prepared, had not transmitted any part of the record on appeal to the supreme court, and had not, within the time allowed by the chief justice, replaced counsel desiring to withdraw for good cause. *Larry C. Iverson, Inc. v. United Bank of Pueblo*, 158 M 223, 490 P 2d 352.

## **DECISIONS UNDER FORMER LAW**

### **Notice of Appeal**

Where appellant sought to amend notice of appeal from a nonappealable order so as to make it an appeal from final judgment, the supreme court acquired no jurisdiction to allow such amendment

when the statutory provisions for time and manner of appeal were not complied with. *Payne v. Mountain States Telephone & Telegraph Co.*, 142 M 406, 385 P 2d 100.

**Rule 12. Effect of dismissal.**

The dismissal of an appeal is in effect an affirmance of the judgment or order appealed from, unless the dismissal is expressly made without prejudice to another appeal.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

**Advisory Committee's Note**

This rule incorporates R. C. M. 1947, section 93-8020.

**Second Appeal Denied**

Appellant, who requested dismissal of his appeal from ruling denying motion to set aside summary judgment, cannot later make a second appeal attacking the validity of the summary judgment. *United Bank of Pueblo v. Iverson*, — M —, 525 P 2d 21.

**Rule 13. Acts of executors, administrators or guardians valid when appointment vacated.**

When the judgment or order appointing an executor, or administrator, or guardian is reversed on appeal, for error, and not for want of jurisdiction of the court, all lawful acts in administration upon the estate performed by such executor, or administrator, or guardian, if he have qualified, are as valid as if such judgment or order had been affirmed.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

**Advisory Committee's Note**

This rule incorporates R. C. M. 1947, section 93-8016.

**Rule 14. Ruling against respondent may be reviewed.**

Whenever the record on appeal shall contain any order, ruling, or proceeding of the trial court against the respondent, affecting his substantial rights on the appeal of said cause, together with any required objection or exception of such respondent, the supreme court on such appeal shall consider such orders, rulings, or proceedings, and the objections and exceptions thereto, and shall reverse or affirm the cause on said appeal according to the substantial rights of the respective parties, as shown upon the record. And no cause shall be reversed upon appeal by reason of any error committed by the trial court against the appellant, where the record shows that the same result would have been attained had such trial court not committed an error or errors against the respondent.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

**Advisory Committee's Note**

This rule incorporates R. C. M. 1947,

section 93-8023, but eliminates references to bills of exceptions and statements of the case properly settled because these rules nowhere provide for such bills and statements.

**Rule 15. Remedial powers of the supreme court.**

When the judgment or order is reversed or modified, the supreme court may make complete restitution of all property and rights lost by the erroneous judgment or order, so far as such restitution is consistent with protection of a purchaser of property at a sale ordered by the judgment, or had under process issued upon the judgment, on an appeal from which the proceedings were not stayed; and for relief in such cases the appellant may have his action against the respondent, enforcing the

judgment for the proceeds of the sale of the property, after deducting therefrom the expenses of the sale.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

**Advisory Committee's Note**

This rule incorporates R. C. M. 1947,

section 93-8024, substituting "supreme court" for "appellate court" and eliminating the provision for damages when the appeal is made for delay. Rule 32 covers the matter of damages.

**Rule 16. Remittitur must be certified to the clerk of the district court.**

When judgment is rendered upon the appeal, it must be certified by the clerk of the supreme court to the clerk of the district court from which the appeal is taken. The clerk of the district court must enter at length in the records of the court the certificate received. Also, in cases of appeal from a judgment, the clerk must enter a minute of the judgment of the supreme court on the docket against the original entry; and in cases of appeal from an order, he must enter a minute against the entry of the order appealed from, containing a reference to the certificate, with a brief statement that such order has been affirmed, reversed, or modified by the supreme court on appeal.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

**Advisory Committee's Note**

This rule incorporates the substance of

R. C. M. 1947, section 93-8025, but eliminates references to the judgment roll, which is nowhere provided for in these rules.

### III. ORIGINAL PROCEEDINGS—EXTRAORDINARY WRITS

**Rule 17. Acceptance and manner of conducting.**

**Rule 17. Acceptance and manner of conducting.**

(a) **WHEN ACCEPTED.** The supreme court is an appellate court but it is empowered by the constitution of Montana to hear and determine such original and remedial writs as may be necessary or proper to the complete exercise of its jurisdiction. The institution of such original proceedings in the supreme court is sometimes justified by circumstances of an emergency nature, as when a cause of action or a right has arisen under conditions making due consideration in the trial courts and due appeal to this court an inadequate remedy, or when supervision of a trial court other than by appeal is deemed necessary or proper.

(b) **HOW COMMENCED AND CONDUCTED.** Proceedings commenced in the supreme court originally to obtain writs of habeas corpus, injunction, review, mandate, quo warranto, supervisory control, and other remedial writs or orders, shall be commenced and conducted in the manner prescribed by the Code of Civil Procedure for the conduct of such or analogous proceedings and by these additional rules. All papers filed shall conform to the requirements of Rule 27, except typewritten applications, briefs, copies of exhibits and the like may be used without securing permission of the chief justice as required by Rule 27(a). The provisions of Rule 27(b) shall be observed.



(c) APPLICATIONS—WHEN FILED. The moving party's application shall be filed with the clerk of the supreme court one hour prior to its presentation to the court.

(d) APPLICATIONS—WHAT TO CONTAIN. The application for the issuance of any of the above writs or orders must set forth, in addition to the other requisite matters, the particular questions and issues anticipated or expected to be raised in the proceeding, and also the fact which renders it necessary and proper that the writ should issue originally from the supreme court; the said matters will be taken into consideration by the court in determining the necessity and propriety of accepting jurisdiction and granting the alternative writ or order to show cause. Each application shall also set forth as exhibits, without repetition of title of court and cause, a copy of each judgment, order, notice, pleading, document, proceeding or court minute referred to in the application, or necessary to make out a prima facie case or to substantiate the pleading or conclusion or legal effect. A memorandum of authorities must be filed with the application. On original applications counsel shall file with the clerk of this court the original court file, with the original application, unless for some reason the same is not available.

(e) APPLICATIONS—HOW AND WHEN PRESENTED. The supreme court will receive and hear original applications in open court on any day when the court is in session; but at least an hour's prior notice of such presentation shall be given by counsel to the chief justice or acting chief justice. Not over fifteen minutes shall be allowed for the presentation of any such application unless on prior request further time is granted.

(f) ISSUANCE OF ALTERNATIVE WRIT OR ORDER TO SHOW CAUSE. This court will, as promptly as possible after the presentation of an application, either dismiss the same, issue an alternative writ, order to show cause, or such other remedial writ or order as it deems expedient.

(g) BRIEFS. At or before the time set for final hearing, each party shall serve and file his brief in full conformance with Rules 20, 23 and 27, and containing a statement of the facts and of the points of law applicable, with the authorities relied upon.

(h) HEARING—WHEN HAD. Unless otherwise ordered the hearing shall be had at the time fixed for the return. At or prior to said return time the opposing party shall serve and file, without waiver, any and all pleadings and motions desired to be presented, including answer or return, and all issues shall be argued at the hearing, the applicant opening and closing, and the parties being allowed the same time as upon argument of appeals. If testimony becomes necessary a reference will be ordered.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-10, Oct. 22, 1971, eff. Jan. 1, 1972.

#### Amendments

The 1971 amendment added to the second sentence of subdivision (b) the clause excepting typewritten papers; added the

## Rule 17(h) RULES OF APPELLATE CIVIL PROCEDURE

third sentence to subdivision (b); and added the final sentence to subdivision (d).

### Supreme Court Memorandum

In October, 1969, the Supreme Court issued a Memorandum to Counsel, reading as follows:

"In order to facilitate presentation and our consideration of applications prepared in accordance with Rule 17(d), M. R. App. Civ. P. for an original or remedial writ, in addition to the requirements of the rule, counsel should, if at all possible, bring to this Court the original district court file, together with transcript of any hearing, if the same has been reduced to writing, that has been had involving the matter sought to be inquired into.

"Compliance with this request will be appreciated."

See final sentence of subdivision (d) added by 1971 amendment.

### Advisory Committee's Note

This rule incorporates Montana Supreme Court Rule IV, with changes in subdivisions (e) and (f) designed to recognize that on original applications the court is not limited to the issuance of alternative writs or orders to show cause, but may issue whatever remedial writ or order it deems expedient.

### Alternative Writs

State highway commission, ordered by district court to produce certain appraisals under discovery rules, was entitled to have order reviewed on allegations that order required production of irrelevant and privileged matter in excess of lower court's jurisdiction, that it was not an appealable order and that commission had no remedy at law, which allegations were sufficient to authorize issuance of alternative writ. *State Highway Commission v. District Court, First Judicial District*, 149 M 384, 427 P 2d 49.

### Declaratory Judgment

Minimum Wage Act was of such importance to all citizens of state and of such nature as to justify original proceeding in supreme court for declaratory judgment as to constitutionality and as to application to firemen and policemen. *City of Billings v. Smith*, 158 M 197, 490 P 2d 221.

Since substantial questions of constitutionality existed with 43-1114, 43-1115, 43-1117 to 43-1119 establishing and empowering defendant legislative finance

committee and its office of legislative fiscal analyst and because operation of these laws would have such significant impact on state government functions during delay before final resolution by supreme court, original jurisdiction of supreme court for declaratory judgment as to constitutionality was properly invoked. *State ex rel. Judge v. Legislative Finance Committee*, — M —, 543 P 2d 1317.

### Injunction

Supreme court declined jurisdiction in original proceeding seeking injunction restraining defendant school districts from collecting certain fees and levies and requiring students to purchase certain material because no emergency existed, class action could be established in district court and thorough examination into multiple problems presented could not have been achieved. *State ex rel. Thompson v. Elementary School Dist. No. 16, Hill County*, 156 M 79, 474 P 2d 700.

Where public service commission reopened its docket and issued further orders in connection with rate schedule change which was being challenged in courts at that time, commission had no authority to take that action and protective order was issued, enjoining respondents from taking actions which interfere with court's appellate jurisdiction. *Montana Consumer Counsel v. Public Service Commission*, — M —, 541 P 2d 769.

### Needless Litigation Prevented

Writ of supervisory control was proper where district court orders requiring state highway commission to quiet title against all possible lien holders of land subject to condemnation and to use valuation date more than three years beyond the alleged proper date were not appealable until after final judgment and this would result in extended and needless litigation if district court was wrong. *State Highway Commission v. District Court*, 160 M 35, 499 P 2d 1228.

### Writ of Supervisory Control

Writ of supervisory control to compel dismissal of removal petition that could not be granted even if the facts alleged were proved was a necessary and proper supervision of district court. *State ex rel. Arnot v. District Court of First Judicial District In and For County of Lewis and Clark*, 155 M 344, 472 P 2d 302.

Although there is no statutory means provided for appealing from the denial of a request to convene a grand jury, a writ of supervisory control may issue so that the decision by the lower court may be

reviewed by the Montana supreme court.  
State ex rel. Woodahl v. District Court,  
— M —, 530 P 2d 780.

**References**

State ex rel. Buttrey Foods, Inc. v.  
District Court, 148 M 350, 420 P 2d 845,  
847.

**IV. APPEALS IN FORMA PAUPERIS**

**Rule 18. Applications and manner of proceeding.**

**Rule 18. Applications and manner of proceeding.**

(a) **APPLICATION TO DISTRICT COURT.** A party who desires to proceed on appeal in forma pauperis shall file in the district court a motion for leave so to proceed together with an affidavit showing, in the detail prescribed by Form 2 of the Appendix of Forms, his inability to pay the fees and costs of the appeal or to give security therefor, his belief that he is entitled to redress, and a statement of the issues he intends to present on appeal. If the motion is granted, the party may proceed on appeal without further application to the supreme court and without payment of fees or costs or the giving of security therefor. If the motion is denied, the district court shall state the reasons for the denial.

(b) **APPLICATION TO THE SUPREME COURT.** If the motion for leave to proceed on appeal in forma pauperis is denied by the district court, a motion for leave so to proceed may be filed in the supreme court within 30 days after entry of the order of denial. The motion shall be accompanied by a copy of the affidavit filed in the district court and of the statement of reasons for denial given by the district court.

(c) **FORM OF BRIEFS, APPENDICES AND OTHER PAPERS.** Parties allowed to proceed in forma pauperis may file briefs, appendices and other papers in typewritten form.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

**Advisory Committee's Note**

This rule is patterned after Rule 23 of the Federal Draft, but omits the last clause of the Federal Draft reading "and

may request that the appeal be heard on the original record without an 'appendix'." This change is made because these rules do not adopt the appendix system of Rule 30 of the Federal Draft. See Rule 25. This rule is believed to be consistent with R. C. M. 1947, section 93-8625.

**V. GENERAL PROVISIONS**

- Rule 19.** Record of commissions and oaths.  
**20.** Filing and service.  
**21.** Computation and extension of time.  
**22.** Motions.  
**23.** Briefs.  
**24.** Brief of an amicus curiae.  
**25.** The appendix to the briefs.  
**26.** Filing and service of briefs.  
**27.** Form of briefs, the appendix, motions and other papers.  
**28.** Prehearing conference.  
**29.** Oral argument.  
**30.** Entry and notice of orders and judgments.  
**31.** Interest on judgments.  
**32.** Damages for appeal without merit.  
**33.** Costs.  
**34.** Petitions for rehearing.



Rule 19(a)      RULES OF APPELLATE CIVIL PROCEDURE

35. Notice and copy of decision—Remittitur—Mandate from United States supreme court.
36. Voluntary dismissal.
37. Substitution of parties.
38. Cases involving constitutional questions where the state is not a party.
39. Calendar—Withdrawal of records.
40. Appeals from injunction orders.
41. Statutes and rules amended.
42. Applicability in general.
43. Title—Effective date—Statutes superseded.

**Rule 19. Record of commissions and oaths.**

(a) **COMMISSIONS AND OATHS.** The commissions and oaths of the justices and the clerk of this court, and the attorney general shall be recorded in the records of this court.

(b) **MINUTES OF COURT.** The minutes of this court shall be approved by the chief justice (or in his absence by the associate justice having the shortest term to serve), and attested by the clerk.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

**Advisory Committee's Note**

This rule incorporates Montana Supreme Court Rule I.

**Rule 20. Filing and service.**

(a) **FILING.** Papers required or permitted to be filed must be placed in the custody of the clerk within the time fixed for filing. Filing may be accomplished by mail addressed to the clerk, but filing shall not be timely unless the papers are actually received within the time fixed for filing. If a motion requests relief which may be granted by a single judge, the judge may permit the motion to be filed with him, in which event he shall note thereon the dates of filing and shall thereafter transmit it to the clerk.

(b) **SERVICE OF ALL PAPERS REQUIRED.** Copies of all papers, including any transcript, filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served by the party or person acting for him on all other parties to the appeal or review. Service on a party represented by counsel shall be made on counsel.

(c) **MANNER OF SERVICE.** Service may be personal or by mail. Personal service includes delivery of the copy to a clerk or other responsible person at the office of counsel. Service by mail is complete on mailing.

(d) **PROOF OF SERVICE.** Papers presented for filing shall contain acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. Proof of service may appear on or be affixed to the papers filed. The clerk may permit papers to be filed without acknowledgment of proof of service but shall require such to be filed promptly thereafter.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

**Advisory Committee's Note**

This rule is taken from Rule 25 of the Federal Draft, but the phrase "in-

cluding any transcript" has been added to subdivision (b) to make it clear that copies of any transcript are to be served

on all parties. The first paragraph of Montana Supreme Court Rule III is superseded.

### **Rule 21. Computation and extension of time.**

(a) **COMPUTATION OF TIME.** In computing any period of time prescribed by these rules, by an order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period shall be included, unless it is a Saturday, Sunday or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

(b) **EXTENSION OF TIME.** The court for good cause shown may upon motion extend the time prescribed by these rules or by its order for doing any act, and may thereby permit an act to be done after the expiration of such time if the failure to act was excusable under the circumstances; but the court may not extend the time for filing a notice of appeal, except as provided in Rule 5.

(c) **ADDITIONAL TIME AFTER SERVICE BY MAIL.** Whenever a party is required or permitted to do any act within a prescribed period after service of a paper upon him and the paper is served by mail, 3 days shall be added to the prescribed period.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

#### **Advisory Committee's Note**

This rule is patterned after Rule 26 of the Federal Draft. There are omitted provisions of the Federal Draft with respect to petitions for allowance, applica-

tions for permission to appeal, appeals from advisory agencies, and a definition of "legal holiday." A definition of "legal holiday" is contained in R. C. M. 1947, section 19-107.

It is believed that these provisions are consistent with R. C. M. 1947, section 90-407.

### **Rule 22. Motions.**

Unless another form is prescribed by these rules, an application for an order or other relief shall be made by filing a motion in writing for such order or relief. The motion shall state with particularity the grounds therefor and shall set forth the order or relief sought. If a motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion. Motions for procedural orders may be determined ex parte. The supreme court may authorize disposition of motions for procedural orders by a single judge. If a motion seeks dismissal of the appeal or other substantial relief, any party may file an answer in opposition within 7 days after service of the motion, or within such time as the court may direct. Motions, supporting papers and any response thereto may be typewritten.

At the time of filing a motion counsel shall present a proposed order, together with sufficient copies for service upon all counsel of record.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

#### **Advisory Committee's Note**

This rule supersedes Montana Supreme

Court Rule XI. It is patterned after Rule 27 of the Federal Draft, but the last sentence of the Federal Draft requiring the filing of three copies of motions and

## Rule 23(a) RULES OF APPELLATE CIVIL PROCEDURE

supporting papers has been omitted. Also, the amendment of the Montana Supreme there has been added as a last paragraph Court Rule X1, effective January 1, 1965.

### Rule 23. Briefs.

(a) BRIEF OF THE APPELLANT. The brief of the appellant shall contain under appropriate headings and in the order here indicated:

(1) A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited.

(2) A statement of the issues presented for review.

(3) A statement of the case. The statement shall first indicate briefly the nature of the case and its disposition in the court below, e.g.: "The plaintiff brought this action in the district court to recover damages for the wrongful death of her husband. The jury returned a verdict for the plaintiff. On motion of the defendant the trial judge entered judgment for the defendant n. o. v. on the ground that there was no evidence to support a finding of negligence on the part of the defendant. From this judgment the plaintiff appeals."

There shall follow a statement of the facts relevant to the issues presented for review, with references to the pages of the parts of the record at which material facts appear (see subdivision (e)).

(4) An argument. The argument may be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and pages of the record relied on.

(5) A short conclusion stating the precise relief sought.

(b) BRIEF OF THE RESPONDENT. The brief of the respondent shall conform to the requirements of subdivision (a) (1) to (4), except that a statement of the issues or of the case need not be made unless the respondent is dissatisfied with the statement of the appellant.

(c) REPLY BRIEF. The appellant may file a brief in reply to the brief of the respondent. The reply brief must be confined to new matter raised in the brief of the respondent. No further briefs may be filed except with leave of court.

(d) REFERENCES IN BRIEFS TO PARTIES. Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such formal designations as "appellant" and "respondent." It promotes clarity to use names or descriptive terms such as "the employee," "the injured person," "the taxpayer," etc.

(e) REFERENCES IN BRIEFS TO THE RECORD. Whenever a reference is made in the briefs to the record, the reference must be to particular parts of the record, suitably designated, and to specific pages of each part, e. g., Answer, p. 7; Motion for Summary Judgment, p. 3; Transcript, p. 231. Intelligible abbreviations may be used. If reference is made to an exhibit, reference shall be made to the pages of the transcript on which the exhibit was identified, offered, and received or rejected.

(f) REPRODUCTION OF STATUTES, RULES, REGULATIONS, ETC. If determination of the issues presented requires the study of



statutes, rules, regulations, etc., or relevant parts thereof, they may be reproduced in the brief or in an addendum at the end, or they may be supplied to the court in pamphlet form. No such reproduction is required, unless ordered by the supreme court. When the error alleged is to the charge of the court, the brief of the parties shall set out with appropriate transcript references the part referred to totidem verbis, whether it be directed to instructions given or instructions refused.

(g) **LENGTH OF BRIEFS AND COSTS.** Except by permission of the court briefs shall not exceed 50 pages of standard typographic printing or 70 pages of printing by any other process of duplicating or copying, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, etc. For purposes of assessing costs under R. C. M. 1947, section 93-8606, reasonable costs shall be limited as follows: For appellant's brief fifty (50) pages; for respondent's brief forty (40) pages; for reply brief fifteen (15) pages. In addition, reasonable costs for briefs shall be limited to \$250 for appellant's brief and \$200 for respondent's brief.

(h) **BRIEFS IN CASES INVOLVING CROSS APPEALS.** If a cross appeal is filed, the plaintiff in the court below shall be deemed the appellant for the purposes of this rule and Rules 25 and 26, unless the parties otherwise agree or the court otherwise orders. The brief of the respondent shall contain the issues and argument involved in his appeal as well as the answer to the brief of the appellant.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-10, Oct. 22, 1971, eff. Jan. 1, 1972.

#### **Amendments**

The 1971 amendment added the third sentence to subdivision (f).

#### **Advisory Committee's Note**

This rule is patterned after Rule 28 of the Federal Draft, adjusted to state

practice. The second paragraph of subdivision (e) of the Federal Draft is omitted, since these rules do not adopt the "appendix" system of Rule 30 of the Federal Draft. See Rule 25.

Also, in the Federal Draft, subdivision (f) requires reproduction of statutes, rules, regulations, etc. This has been changed, so that reproduction is permissive, unless ordered by the supreme court.

#### **Rule 24. Brief of an amicus curiae.**

A brief of an amicus curiae may be filed only if accompanied by written consent of all parties, or by leave of court granted on motion. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. A motion of an amicus curiae for leave to participate in the oral argument will be granted only for extraordinary reasons.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

#### **Advisory Committee's Note**

This rule is taken from Rule 29 of the

Federal Draft. It follows the practice of a majority of federal circuits in requiring leave of court to file an amicus brief unless the litigants consent to its filing.

#### **Rule 25. The appendix to the briefs.**

(a) **USE OF AN APPENDIX.** At any time before final decision, the supreme court may order an appendix to any brief. Also, either the appellant or respondent may, if he deems it desirable, prepare, file and serve with his brief an appendix.

(b) **CONTENTS OF THE APPENDIX.** Unless otherwise ordered by the supreme court, an appendix shall contain: (1) the relevant docket entries in the proceeding below; (2) any relevant pleading and relevant portions of the charge, finding and opinion; (3) the judgment, order or decision in question; and (4) such other parts of the record as any party deems it essential for the judges of the court to read in order to decide the issues presented. In designating parts of the record for inclusion in the appendix, the parties shall have regard for the fact that the entire record is always available to the court for reference or examination and shall not engage in unnecessary designation.

(c) **ARRANGEMENT OF THE APPENDIX.** At the beginning of the appendix there shall appear a chronological list of the parts of the record which it contains. Each part of the record shall be listed by the descriptive title given to that part by the reference made to it in the briefs. The page or pages of the appendix at which each part of the record thus listed appears shall be set out opposite each listing in a column at the right, so as to permit immediate location in the appendix of the parts of the record referred to in the briefs and contained in the appendix.

The relevant docket entries in the proceeding below shall follow the list of contents. Thereafter, the parts of the record shall be set out in chronological order. The original paging of each part of the record set out in the appendix shall be indicated by placing in brackets the number of the original page at the place where that page begins. Omissions in the text of papers or of testimony must be indicated by asterisks. A question and its answer may be contained in a single paragraph.

(d) **REPRODUCTION OF EXHIBITS.** Exhibits may be contained in a separate volume, suitably indexed.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

**Advisory Committee's Note**

Rules 30 and 31 of the Federal Draft, require post-brief appendices, unless dispensed with by court rule or order. The

rule does not follow the Federal Draft at this point. Rather, under this rule the supreme court may order an appendix, or either party may if he chooses use an appendix. When an appendix is used it is to be filed and served with the brief.

**Rule 26. Filing and service of briefs.**

(a) **TIME FOR FILING BRIEFS.** The appellant shall serve and file his brief within 30 days after the date on which the record is filed. The respondent shall serve and file his brief within 30 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the respondent, but, except for good cause shown, a reply brief must be served and filed at least 3 days before argument.

(b) **NUMBER OF COPIES TO BE FILED AND SERVED.** Ten copies of each brief shall be filed with the clerk of the supreme court unless otherwise ordered by the court, and one copy of each brief shall be served on counsel for each party separately represented. The clerk will not accept a brief for filing unless it is accompanied by acknowledgment or proof of service as required by Rule 20.

(c) CONSEQUENCES OF FAILURE TO FILE BRIEFS. If an appellant fails to file his brief within the time provided by this rule, or within the time extended, a respondent may move for dismissal of the appeal. If a respondent fails to file his brief, he will not be heard at oral argument except by permission of the court.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

#### Advisory Committee's Note

This rule is patterned after Rule 31 of the Federal Draft.

Subdivision (a) follows the time fixed for filing of briefs provided in the Federal Draft, and that is the time now allowed by a majority of the federal circuits.

Subdivision (b) of the Federal Draft is omitted, since it provides a post-brief time for filing the appendix. Under Rule 25 an appendix must be filed and served with the brief, unless otherwise ordered by the supreme court.

Subdivision (b) of this rule is patterned after subdivision (c) of the Federal Draft. The number of copies to be filed and served, however, are adjusted to fit state practice and the present requirement of Montana Supreme Court Rule II.

Subdivision (c) of this rule follows subdivision (d) of Rule 31 of the Federal Draft.

#### Failure of Respondent

Where the respondent does not appear by brief, appellate court shall take appellant's versions and positions as being correct if they are in fact supported by the record. *Alden v. Board of Zoning Commissioners*, — M —, 528 P 2d 1320.

### Rule 27. Form of briefs, the appendix, motions and other papers.

(a) FORM OF BRIEFS, APPENDICES AND SEPARATE VOLUMES OF EXHIBITS. Briefs, appendices and separate volumes of exhibits may be produced by standard typographic printing or by any duplicating or copying process capable of producing a clear black image on white paper. Typewritten copies of briefs, appendices and separate volumes of exhibits may not be submitted without permission of the chief justice of the supreme court, except in behalf of parties allowed to proceed in forma pauperis. Pica solid is the smallest letter and the most compact form of composition allowed for all printed matter. Briefs, appendices and separate volumes of exhibits shall be on white uncalendered book paper in book or booklet form. If produced by the standard typographic printing process, the pages shall be ten inches long and seven inches wide, with a margin on the outer edge not less than one inch wide and on the inner edge not less than two inches wide. If produced by a duplicating or copying process, the pages shall be eleven inches long and eight and one-half inches wide, with a margin on the outer edge not less than one inch wide and on the inner edge not less than two inches wide. The pages shall be fastened at the side and numbered at the top.

(b) TYPEWRITTEN PAPERS AND MOTIONS. Papers not required to be produced in a manner prescribed by subdivision (a) of this rule shall be plainly and legibly written by a typewriter with a new black ribbon and new black carbon paper of good grade, in double spacing, except that quotations may be single spaced, on one side only of white typewriter paper, eight and one-half inches wide and thirteen inches long, numbered at the bottom, with a ruled margin of one and one-half inches on the left-hand side of the page and one inch on the right-hand side, and numbered lines, not more than thirty-two lines to the page. The pages shall be bound at the left-hand side into volumes not containing more than two hundred fifty pages; provided, however, that if the pages number fifty or less they may be bound at the top.



In collating typewritten papers the copies shall not be mixed, but each copy shall consist throughout of uniform pages. Each page of every copy shall be opaque and each line of print thereon plainly legible. The difficulty of examining transparent, illegible and nonuniform typewritten copies has become so great that this rule will be strictly applied and papers not complying with it will not be received.

(c) **FIRST PAGE AND COVER.** All papers shall be bound in cardboard or pasteboard covers, unless bound at the top under subdivision (b) of this rule, in which case they may be bound in cover paper. On the first page and cover of all papers must be stated the title of this court, the title of the case as in the court below, adding to the words "Plaintiff" and "Defendant," the words "Appellant" and "Respondent" as the case may require, the names of counsel for appellant and respondent, the title of the papers, as "Appellant's Brief," "Appendix to Appellant's Brief," etc., and the venue from which the appeal is taken.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

**Advisory Committee's Note**

Rule 32 of the Federal Draft is adjusted to conform to the paper and forms

prescribed for state practice and Montana Supreme Court Rule II, as amended effective January 1, 1965. The provisions requiring the use of pica type and two typewritten originals are stricken as being obsolete or unnecessary.

**Rule 28. Prehearing conference.**

The court may direct the attorneys for the parties to appear before the court or a judge thereof for a prehearing conference to consider the simplification of the issues and such other matters as may aid in the disposition of the proceedings by the court. The court or judge shall make an order which recites the action taken at the conference and the agreements made by the parties as to any of the matters considered and which limits the issue to those not disposed of by admission or agreements of counsel, and such order when entered controls the subsequent course of the proceedings, unless modified to prevent manifest injustice.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

**Advisory Committee's Note**

This rule is taken from Rule 33 of the Federal Draft.

**Rule 29. Oral argument.**

(a) **NOTICE OF HEARING—POSTPONEMENT.** The clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the hearing must be made by motion filed reasonably in advance of the date fixed for hearing.

(b) **TIME ALLOWED FOR ARGUMENT.** Upon oral argument of an appeal or original proceeding, 40 minutes will be allowed appellant or applicant and 30 minutes to respondent. If counsel is of the opinion that additional time is necessary for the adequate presentation of his argument, he may request such additional time as he deems necessary by motion filed reasonably in advance of the date fixed for hearing. A party is not obliged to use all of the time allowed, and the court may terminate the argument whenever in its judgment further argument is unnecessary.

(c) **ORDER AND CONTENT OF ARGUMENT.** The appellant or applicant is entitled to open and conclude the argument. The opening argument shall include a fair statement of the case, and the closing argu-

ment shall be limited to rebuttal of respondent's argument. Counsel will not be permitted to read at length from briefs, records or authorities.

(d) **CROSS AND SEPARATE APPEALS.** A cross or separate appeal shall be argued with the initial appeal at a single hearing, unless the court otherwise directs. If a case involves a cross appeal, the plaintiff in the action below shall be deemed the appellant for the purpose of this rule unless the parties otherwise agree or the court otherwise directs. If separate appellants support the same argument, care shall be taken to avoid duplication of argument at the hearing.

(e) **NONAPPEARANCE OF COUNSEL—FAILURE TO FILE BRIEFS.** If counsel for a party fails to appear to present argument, the court may hear argument on behalf of a party whose counsel is present, and the case will be decided on the briefs and the argument heard. If no counsel appear for any party, the case will be decided on the briefs unless the court shall otherwise order.

(f) **SUBMISSION ON BRIEFS.** By agreement of the parties, a case may be submitted for decision on the briefs, but the court may direct that the case be argued.

(g) **USE OF PHYSICAL EXHIBITS AT HEARING—REMOVAL.** If physical exhibits other than documents are to be used at the hearing, counsel shall arrange to have them placed in the courtroom before the court convenes on the date of the hearing. After the hearing counsel shall cause the exhibits to be removed from the courtroom unless the court otherwise directs. If exhibits are not reclaimed by counsel within a reasonable time after notice is given by the clerk, they shall be destroyed or otherwise disposed of as the clerk shall think best.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

#### **Advisory Committee's Note**

This rule is patterned after Rule 34 of the Federal Draft, but the time provisions are more liberal than those of the Federal Draft which allows 30 minutes to each side. It is intended that the time be afforded to opposing interests rather than to individual parties, as is true under the

Federal Draft. Thus, if there are multiple appellants they have together but 40 minutes, and multiple respondents have a total of 30 minutes. The 40 minutes for the appellant or applicant may be divided between the opening and closing statement, as the appellant or applicant chooses.

In other particulars this rule follows the usual practice among the federal circuits.

### **Rule 30. Entry and notice of orders and judgments.**

(a) **ENTRY AND NOTICE.** The notation of a judgment or order in the docket constitutes entry thereof. Upon entry of a judgment or order, the clerk shall promptly mail to all parties a copy of the judgment or order, and notice of the date of entry thereof.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

#### **Advisory Committee's Note**

This rule is patterned after Rule 36 of the Federal Draft. The purpose is to clarify what constitutes an entry of a

judgment or order. The provision for mailing by the clerk is for the convenience of the parties but does not affect the time for taking an appeal, which is controlled by Rule 5. As to the entry of judgments, see M. R. Civ. P., Rule 58.

### **Rule 31. Interest on judgments.**

If a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was

rendered or made in the district court. If a judgment is modified or reversed with a direction that a judgment for money be entered in the district court, the mandate shall contain instructions with respect to allowance of interest.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

#### **Advisory Committee's Note**

The language of Rule 37 of the Federal Draft is modified to conform to R. C. M. 1947, section 93-8622.

#### **Reversal without Directions**

Where supreme court by its reversal of judgment granted plaintiff's demand for payment of dishonored checks, further evidence as to damages would not be proper; and although court omitted specific directions, there was no need for a new trial. *Sun River Cattle Co. v. Miners' Bank of Montana*, — M —, 525 P 2d 19.

### **Rule 32. Damages for appeal without merit.**

If the supreme court is satisfied from the record and the presentation of the appeal, that the same was taken without substantial or reasonable grounds, but apparently for purposes of delay only, such damages may be assessed on determination thereof as under the circumstances are deemed proper.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

#### **Advisory Committee's Note**

The language of Montana Supreme Court Rule XIX is substituted for that of Rule 38 of the Federal Draft.

#### **Damages Not Allowed**

Appellee was not entitled to recover additional damages under this rule where appellant had a reasonable ground for appeal. *Larry Larson & Associates v. John R. Daily, Inc.*, 158 M 231, 490 P 2d 355.

Assessment of damages against appellants was declined where issue of penalty payment due to professional employee was arguable and had not previously been decided by the appellate court. *Hammill v. Young*, — M —, 540 P 2d 971.

#### **Frivolous Appeals**

Strangers to action who filed various documents which were stricken as frivolous, then appealed from such striking, were assessed \$1000 damages under this rule. *Farmers State Bank of Conrad v. Iverson*, — M —, 509 P 2d 839.

Where defendants, who were liable under two judgments to pay plaintiff in excess of \$16,000, offered him \$152 as satisfaction in full pursuant to a stipulation by the parties' attorneys allegedly authorizing such a settlement, then appealed issuance of a writ of execution to enforce the judgment after plaintiff's rejection of their tender, they were guilty of attempting to delay payment of their debt by means of a frivolous appeal, and plaintiff was entitled to damages under this rule. *Heller v. Osburnsen*, — M —, 548 P 2d 607.

### **Rule 33. Costs.**

(a) **COSTS ON APPEAL.** Costs on appeal will be taxed as provided by R. C. M. 1947, section 93-8606, and if not otherwise provided by the Court in its decision, will automatically be awarded to the successful party against the other party. All costs on appeal shall be claimed as provided by section 93-8621, R. C. M. 1947.

(b) **COSTS OF BRIEFS AND APPENDICES.** The cost of printing or otherwise producing briefs and appendices shall be taxable at rates not higher than specified in Rule 23(g).

(c) **OTHER COSTS TAXABLE.** Costs incurred in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal, and the fee for filing notice of appeal shall be taxed in the dis-



strict court as costs of the appeal in favor of the party entitled to costs under this rule.

(d) **COSTS IN ORIGINAL PROCEEDINGS.** Costs in original proceedings, including reviews other than by appeal, will be taxed as provided by R. C. M. 1947, sections 93-8602, 93-8603, 93-8604 and 93-8611, and if not otherwise provided by the court in its decision, will be awarded to the successful party against the other party; provided, however, that costs awarded to plaintiff or relator in special proceedings to review inferior court rulings, orders or judgments will ordinarily be assessed against the real party in interest, namely, the party interested in upholding the inferior court's action, rather than against the state, county, municipality, subdivision, judge or justice.

(e) **UNNECESSARY COSTS.** Whenever it appears that the successful party has caused any redundant, useless or unnecessary matter to be incorporated in the record, briefs, or appendices, whether on appeal or in a special proceeding, he shall not recover as part of his costs so much of the expense as is occasioned thereby.

(f) **NOTATION BY CLERK.** The clerk of the supreme court shall, in all cases, include in the order of judgment of affirmance, reversal or modification on appeal, or for the issuance of a peremptory writ in an original proceeding, and in the remittitur, peremptory writ or judgment, a clause awarding the costs in accordance with this rule or the special order of this Court, to be recovered after claim and ascertainment or taxation thereof in the manner prescribed by law; and the clerk shall also furnish therewith an itemized statement of such costs as have been paid by him.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-8, Sept. 10, 1968, eff. Jan. 1, 1969.

#### Amendments

The amendment of September 10, 1968, in subdivision (a), added the last sentence; in subdivision (b), deleted "in the supreme court" after "taxable" and deleted a second sentence reading "A party who desires such costs to be taxed shall state them in a verified bill of costs which he shall file with the clerk, with proof of service, within 14 days after entry of judgment"; in subdivision (c), substituted the present caption for "costs taxable in the District Court[s]"; in subdivision (f), inserted "the" before "costs in accordance", deleted "in the supreme court" before "in

accordance" and substituted "by" for "to" before "him."

#### Advisory Committee's Note

This rule is a combination of Rule 39 of the Federal Draft and Montana Supreme Court Rule XVIII. With some adjustment of language, subdivision (a) is taken from the Montana Rule; subdivisions (b) and (c) from the Federal Draft; and subdivisions (d), (e) and (f) from the Montana Rule.

#### Advisory Committee's Note to September 10, 1968 Amendment

The amendments to Rule 33(a), (b), (c) and (f) are to make it clear that all costs on appeal are claimed in the court below after remittitur and eliminate the former duplication of cost bills in both the supreme court and district court.

### Rule 34. Petitions for rehearing.

When, in appeals or special proceedings, it is ordered that remittitur, peremptory writ or judgment issue forthwith, no petition for rehearing will be entertained. In all other cases a petition for rehearing may be filed within 10 days after the decision of the supreme court has been

rendered, unless the time is shortened or enlarged by order, and the adverse party shall have 7 days thereafter in which to serve and file his objections thereto. Extensions of time will be granted only upon showing of unusual merit, and in no event in excess of 10 days. A petition for rehearing may be presented upon the following grounds and none other: That some fact, material to the decision, or some question decisive of the case submitted by counsel, was overlooked by the court, or that the decision is in conflict with an express statute or controlling decision to which the attention of the court was not directed. Oral argument in support of the petition will not be permitted. Six copies of the petition and six copies of objections thereto, which may be in typewritten form, shall be filed with the clerk.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

#### **Amendments**

The amendment of September 29, 1967 substituted "fact" for "facts" following the colon; deleted a former, next to last sentence reading "No reply to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will not ordinarily be granted in the absence of such a request"; and substituted "and six copies of objections \* \* \* form" for "produced in accordance with Rule 27(a)."

#### **Advisory Committee's Note**

This rule is patterned in part after Rule 40 of the Federal Draft. However, the first sentence is added from Montana Supreme Court Rule XV, as is the statement of the grounds for the petition and the procedure for serving and filing objections; also the 14 days for filing pro-

vided in the Federal Draft has been shortened to conform to state practice, and the number of copies required has been reduced from 25 to 6. The second sentence provides for filing of the petition within 10 days after "the decision of the supreme court has been rendered," rather than after "entry of judgment" as provided by the Federal Draft. The purpose is to avoid uncertainty as to when a judgment has been entered, which might exist under the language of the Federal Draft where the mandate of the supreme court is returned to the district court and there entered.

#### **Advisory Committee's Note to September 29, 1967 Amendment**

Source: None.

This amendment would dispense with requests by the court as a condition to filing replies to petitions for rehearing, and would permit petitions and objections thereto to be typewritten in the form prescribed by Rule 27(b).

### **Rule 35. Notice and copy of decision—Remittitur—Mandate from United States supreme court.**

(a) **NOTICE AND COPY OF DECISION TO BE FURNISHED.** Upon the decision of a cause, notice thereof, together with a copy of the court's written decision, will immediately be mailed to counsel for each party.

(b) **REMITTITUR — WHEN ISSUED — WHEN COPY OF OPINION TO ACCOMPANY.** Remittitur may, in cases where it is deemed proper, be ordered forthwith; otherwise the same shall be issued promptly upon expiration of time for filing petition for rehearing, or, if such petition is filed, then upon the denial thereof, unless a modification of the decision is made which permits a further petition for rehearing. A copy of the opinion must accompany the remittitur when the judgment or order of the trial court is reversed or modified and the case remanded for further proceedings other than the entry of a final judgment or order terminating the proceedings in the trial court.

(c) **MANDATE FROM UNITED STATES SUPREME COURT—PROCEDURE THEREON.** Upon receipt by the clerk of the supreme court of Montana of a mandate from the supreme court of the United States in any case at law or in equity theretofore taken from the supreme court of Montana to the supreme court of the United States, it shall be the duty of said clerk forthwith to issue under his hand and the seal of the supreme court of Montana a remittitur to the district court by which the judgment was rendered, commanding such court to take such action in the premises as by the mandate shall be proper, and said remittitur shall also contain therein a recital in haec verba of the said mandate, and all the costs subsequent to the appeal from said district court shall be taxed in such remittitur.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

**Advisory Committee's Note**

This rule incorporates Montana Supreme Court Rules XIV, XXI, and XXII.

**Rule 36. Voluntary dismissal.**

If the parties to an appeal or other proceeding shall sign and file with the clerk an agreement that the proceeding be dismissed, specifying the terms as to payment of costs, and shall pay whatever fees are due, the clerk shall enter the case dismissed, and shall give to each party a copy of the agreement filed; but no mandate or other process shall issue without an order of the court. An appeal may be dismissed on motion of the appellant upon such terms as to costs as may be agreed upon by the parties or fixed by the court. If an appeal has not been docketed the appeal may be dismissed by the court from which the appeal was taken upon the filing in that court of a stipulation for dismissal signed by all parties, or upon motion and notice by the appellant.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

**Advisory Committee's Note**

This rule is taken from Rule 42 of the Federal Draft.

**Rule 37. Substitution of parties.**

(a) **DEATH OF A PARTY.** If a party dies after a notice of appeal is filed or while a proceeding is otherwise pending in the supreme court, the personal representative of the deceased party may be substituted as a party on motion filed by the representative or by any party with the clerk of the supreme court. The motion of a party shall be served upon the representative in accordance with the provisions of Rule 20. If the deceased party has no representative, any party may suggest the death on the record and proceedings shall then be had as the supreme court may direct. If a party against whom an appeal may be taken dies after entry of a judgment or order in the district court but before a notice of appeal is filed, an appellant may proceed as if death had not occurred. After the notice of appeal is filed substitution shall be effected in the supreme court in accordance with this subdivision. If a party entitled to appeal shall die before filing a notice of appeal, the notice of appeal may be filed by his personal representative, or, if he has no personal represent-



Rule 37(b)      RULES OF APPELLATE CIVIL PROCEDURE

ative, by his attorney of record within the time prescribed by these rules. After the notice of appeal is filed substitution shall be effected in the supreme court in accordance with this subdivision.

(b) **SUBSTITUTION FOR OTHER CAUSES.** If substitution of a party in the supreme court is necessary for any reason other than death, substitution shall be effected in accordance with the procedure prescribed in subdivision (a).

(c) **PUBLIC OFFICERS—DEATH OR SEPARATION FROM OFFICE.**

(1) When a public officer is a party to an appeal or other proceeding in the supreme court in his official capacity and during its pendency dies, resigns or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) When a public officer is a party to an appeal or other proceeding he may be described as a party by his official title rather than by name; but the court may require his name to be added.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

**Advisory Committee's Note**

This rule is taken from Rule 43 of the Federal Draft.

**Rule 38. Cases involving constitutional questions where the state is not a party.**

It shall be the duty of counsel who challenges the constitutionality of any act of the Montana legislature in any suit or proceeding in the supreme court to which the state of Montana, or any agency thereof, or any officer or employee thereof, as such officer or employee, is not a party, upon the filing of the record to give immediate notice in writing to the court of the existence of said question, specifying the section of the Code or the chapter of the session law to be construed. The clerk shall thereupon certify such fact to the attorney general of the state of Montana.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

**Advisory Committee's Note**

This rule is patterned after Rule 44 of the Federal Draft.

**Constitutional Question**

Constitutional questions presented for review on appeal which were not raised in the trial court and were not certified to the supreme court with notice to the attorney general will not be considered by the court. *Gilbert v. Gilbert*, — M —, 533 P 2d 1079.

**Notice to Attorney General**

If the procedures of Rule 38 have not

been followed and there has been no notice to the attorney general that a legislative act is being challenged on constitutional grounds, the issue is not properly before the court. *Clontz v. Clontz*, — M —, 531 P 2d 1003; *Grant v. Grant*, — M —, 531 P 2d 1007.

Notice to attorney general in compliance with this rule, given on the same day the case was certified to the supreme court, was sufficient to allow adequate preparation for the hearing, set 2½ months later, and satisfied the "immediate notice" requirement. *U.S. Mfg. & Distributing Corp. v. City of Great Falls*, — M —, 546 P 2d 522.

**Rule 39. Calendar—Withdrawal of records.**

(a) **PLACING CAUSES UPON CALENDAR.** Thirty days after the appellant's brief has been filed, the cause shall be placed on the calendar as ready for oral argument.

(b) **SETTING CAUSES FOR ARGUMENT.** As often as found convenient, causes on the calendar will be set for argument by the court in the chronological order in which they have been placed on the calendar, except such causes as are determined entitled to precedence or as otherwise ordered by the court. Oral arguments will not be heard during the months of July and August.

(c) **ADVANCEMENT OF CAUSES.** Appeals from orders dissolving, refusing to dissolve, granting or refusing to grant writs of injunction, appeals from orders dissolving or refusing to dissolve attachments, appeals from orders appointing or refusing to appoint receivers, appeals from orders or judgments holding appellant in custody, and workmen's compensation appeals, are entitled to precedence and will, upon motion of either party, be advanced on the calendar.

(d) **PERMISSION TO TAKE RECORD FROM CLERK'S OFFICE.** The records and other papers of the supreme court shall not be taken therefrom except by counsel pursuant to a written order of a justice of the court, which order shall specify the time the same may be retained out of the clerk's office; provided, that the court or a justice thereof may require the same to be returned within a shorter period upon notice. The clerk shall preserve each order and counsel's receipt until the papers therein mentioned shall be returned.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

**Advisory Committee's Note**

Montana Supreme Court Rules XIII and XVI have been substituted for the provisions of Rule 45 of the Federal Draft.

**Rule 40. Appeals from injunction orders.**

Upon appeal from an order dissolving or refusing an injunction, if the appellant desires to continue in force the injunction order dissolved by the district court, or to obtain such injunction order pending the appeal, he shall apply to the district court under Rule 62 of the Montana Rules of Civil Procedure. In the event the relief there requested be not granted he may file in the supreme court his sworn application, setting forth the proceedings appealed from and the relief desired, and present with it to the supreme court, a verified copy of the affidavits or evidence used on the hearing in the district court. Such application will be heard ex parte and without argument, and the court, upon such record will make such order in the premises as may be proper.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

**Advisory Committee's Note**

This rule incorporates the substance of Supreme Court Rule XXIII, as amended effective April 3, 1963.

**Rule 41. Statutes and rules amended.**

[This rule amended Rule 72 of the Montana Rules of Civil Procedure, and R. C. M. 1947, sections 93-5708, 93-8001, 93-8002, 93-8013 and

93-9905, subdivision 3. For text of amendments see the designated sections.]

**Rule 42. Applicability in general.**

(a) **SPECIAL STATUTORY PROCEEDINGS.** The statutory proceedings listed in Table A of the Montana Rules of Civil Procedure and any other special statutory proceedings, whether or not listed in said Table A, are excepted from these rules in so far as they are inconsistent or in conflict with the procedure and practice provided by these rules.

(b) **APPEALS TO DISTRICT COURTS.** These rules do not supersede the provisions of statutes relating to appeals to or review by the district courts, which shall govern procedure and practice relating thereto in so far as they are not inconsistent with these rules.

(c) **RULES INCORPORATED INTO STATUTES.** Where any statute heretofore or hereafter enacted, whether or not applicable to a special statutory proceeding or listed in any table appended hereto, provides that any act in a civil proceeding in a district court or in the Montana supreme court shall be done in the manner provided by law or as in a civil action or as provided by any statute superseded by these rules, such act shall be done in accordance with these rules and the procedure thereon shall conform to these rules, in so far as practicable.

**History:** En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

**Advisory Committee's Note**

This Rule is patterned after Rule 81 of the Montana Rules of Civil Procedure. It excepts inconsistent special statutory proceedings and appeals to and reviews by the district courts to the extent that

they are governed by inconsistent statutes and it is impracticable to incorporate procedures provided by these rules. But statutes such as sections 93-9302, 93-9303, 93-9718, 93-9719, and 93-9922, which contain catch-all references to the applicability of statutes which have been superseded, are brought into line with these rules in so far as practicable.

**Rule 43. Title—Effective date—Statutes superseded.**

(a) **TITLE.** These Rules shall be known as the Montana Rules of Appellate Civil Procedure and may be cited as M. R. App. Civ. P.

(b) **EFFECTIVE DATE AND APPLICATION TO PENDING PROCEEDINGS.** These rules will take effect on January 1, 1966. They govern all appeals and original proceedings brought after they take effect, and also all further proceedings in appeals and original proceedings then pending, except to the extent that in the opinion of the supreme court their application in a particular appeal or original proceeding pending when the rules take effect would not be feasible, or would work injustice, in which event the procedure existing at the time the appeal or original proceeding was brought applies.

(c) **STATUTES AND RULES SUPERSEDED.** Upon the taking effect of these rules all statutes and rules, and parts thereof, in conflict herewith, and the statutes and rules listed in Tables A, B, and C, in so far as they relate to civil proceedings, are superseded in respect of practice and procedure on appeals from the district courts to the supreme court and in original proceedings brought in the supreme court.



History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

#### Advisory Committee's Note

This rule incorporates provisions similar to those contained in Rules 85 and 86

of the Montana Rules of Civil Procedure. Subdivision (c) refers to statutes and rules only in so far as they relate to civil proceedings, to make it clear that criminal proceedings are in no way affected by these rules.

### Appendix of Forms.

#### Form 1.

NOTICE OF APPEAL TO THE SUPREME COURT OF  
THE STATE OF MONTANA FROM A JUDGMENT  
OR ORDER OF A DISTRICT COURT  
IN THE DISTRICT COURT OF THE ..... JUDICIAL DISTRICT  
OF THE STATE OF MONTANA,  
IN AND FOR THE COUNTY OF .....

A. B.		Plaintiff	} Notice of Appeal
	vs.		
C. D.		Defendant	

Notice is hereby given that C. D., defendant above-named, hereby appeals to the supreme court of the state of Montana (from the final judgment) (from the order (describing it)) entered in this action on the ..... day of ....., 19.....

(S) .....

Attorney for C. D.  
(Address)

#### Form 2.

AFFIDAVIT TO ACCOMPANY MOTION FOR LEAVE TO  
APPEAL IN FORMA PAUPERIS  
IN THE DISTRICT COURT OF THE ..... JUDICIAL DISTRICT  
OF THE STATE OF MONTANA,  
IN AND FOR THE COUNTY OF .....

A. B.		Plaintiff	} AFFIDAVIT IN SUPPORT OF APPLICATION TO PROCEED ON APPEAL WITHOUT PRE- PAYMENT OF COSTS
	vs.		
C. D.		Defendant	

I, ....., being first duly sworn, depose and say that I am the ..... in the above-entitled case; that in support of my application to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

Table A                      RULES OF APPELLATE CIVIL PROCEDURE

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

- 1. Are you presently employed?
  - a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.
  - b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.
- 2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?
  - a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.
- 3. Do you own any cash or checking or savings account?
  - a. If the answer is yes, state the total value of the items owned.
- 4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?
  - a. If the answer is yes, describe the property and state its approximate value.
- 5. List the persons who are dependent upon you for support and state your relationship to those persons.

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

-----  
Subscribed and Sworn to before  
me this ..... day of .....,  
19 .....

-----  
Notary Public

Let the applicant proceed without  
prepayment of costs.

-----  
District Judge

Table A. List of Statutes and Rules Superseded or Amended.

Statutes Superseded (R. C. M. 1947, sections)	R.S.C.M.* Superseded, except as applicable to criminal procedure	M.R.Civ. P.** Rule Superseded
93-5501		62(a)
93-5503		62(d)
93-5504	Rule	Amended
93-5505	I	72
93-5506	II	
93-5507	III (1st par.)	
93-5508	IV	

93-5509	VI
93-5607	VII
93-5608	VIII
93-5702	IX
93-5707	X
93-8003	XI
93-8004	XII
93-8005	XIII
93-8006	XIV
93-8011	XV
93-8012	XVI
93-8014	XVII
93-8015	XVIII
93-8016	XIX
93-8017	XXI
93-8018	XXII
93-8019	XXIII
93-8020	XXIV
93-8021	
93-8022	
93-8023	
93-8024	
93-8025	
Amended	
93-5708	
93-8001	
93-8002	
93-8013	
93-9905(3)	

\* Rules of the Supreme Court of Montana.

\*\* Montana Rules of Civil Procedure.

Table B. List of Rules of Appellate Civil Procedure Superseding, in Whole or in Part, or Amending, Statutes and Rules.

	Statutes and Rules** Superseded or Amended (R. C. M. 1947, sections)
M. R. App. Civ. P.*	
Rule	
1 .....	93-8001, 93-8002, 93-8003, 93-8017
2 .....	93-8022
3 .....	93-8019, R. S. C. M. XXIV
4 .....	93-8005, 93-8019
5 .....	93-8004
6 .....	93-8005, 93-8006, 93-8012, 93-8015, 93-8019
7 .....	93-5607, 93-8011, 93-8012, 93-8014, M. R. Civ. P. 62(a), 62(d)
8 .....	93-8013



9, 10, and 25 .....	93-5504 to 93-5509, incl., 93-5608, 93-5707, 93-8018, 93-8019, 93-8021 R. S. C. M. VII, VIII, IX, XVIII subd. 3
11 .....	93-8019, R. S. C. M. VI
12 .....	93-8020
13 .....	93-8016
14 .....	93-8023
15 .....	93-8024
16 .....	93-8025
17 .....	R. S. C. M. IV
19 .....	R. S. C. M. I
20 .....	R. S. C. M. III (1st par.)
22 .....	R. S. C. M. XI
23 .....	R. S. C. M. X
26 .....	R. S. C. M. II subd. 4, III (1st par.)
27 .....	R. S. C. M. II
29 .....	93-5702, R. S. C. M. XII
32 .....	R. S. C. M. XIX
33 .....	R. S. C. M. XVIII
34 .....	R. S. C. M. XV
35 .....	R. S. C. M. XIV, XXI, XXII
37 .....	R. S. C. M. XVII
39 .....	R. S. C. M. XIII, XVI
40 .....	R. S. C. M. XXIII
41 .....	M. R. Civ. P. 72, 93-5708, 93-9905 (3), 93-8001, 93-8002, 93-8013

\* Montana Rules of Appellate Civil Procedure are abbreviated "M. R. App. Civ. P."

\*\* Rules of the Supreme Court of Montana are abbreviated "R. S. C. M." Montana Rules of Civil Procedure are abbreviated "M. R. Civ. P."

**Table C. List of Statutes and Rules Superseded, in Whole or in Part, or Amended, by Designated Rules of Appellate Civil Procedure.**

Statutes (R. C. M. 1947, sections)	M. R. App. Civ. P. Rule
93-5504 to 93-5509, incl. ....	9, 10, 25
93-5607 .....	7
93-5608 .....	9, 10, 25
93-5702 .....	29
93-5707 .....	9, 10, 25
93-5708 .....	41
93-8001 .....	1, 41
93-8002 .....	1, 41
93-8003 .....	1
93-8004 .....	5
93-8005 .....	4, 6
93-8006 .....	6
93-8011 .....	7
93-8012 .....	6, 7

93-8013 .....	8, 41
93-8014 .....	7
93-8015 .....	6
93-8016 .....	13
93-8017 .....	1
93-8018 .....	9, 10, 25
93-8019 .....	4, 6, 9, 10, 11, 25
93-8020 .....	12
93-8021 .....	9, 10, 25
93-8022 .....	2
93-8023 .....	14
93-8024 .....	15
93-8025 .....	16
93-9905 (3) .....	41

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I .....	19
II .....	26, 27
III (1st par.) .....	20, 26
IV .....	17
VI .....	11
VII .....	9, 10, 25
VIII .....	9, 10, 25
IX .....	9, 10, 25
X .....	23
XI .....	22
XII .....	29
XIII .....	39
XIV .....	35
XV .....	34
XVI .....	39
XVII .....	37
XVIII .....	9, 10, 25, 33
XIX .....	32
XXI .....	35
XXII .....	35
XXIII .....	40
XXIV .....	3

### Montana Rules of Civil Procedure

62(a) .....	7
62(d) .....	7
72 .....	41





CHAPTER 3002  
MONTANA RULES OF EVIDENCE

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Note: A loose-leaf edition of the Montana Rules of Evidence, including source notes, commission comments and special tables, is available from the State Bar of Montana, P. O. Box 4669, Helena 59601.

ARTICLE I. GENERAL PROVISIONS

- Rule
100. Short title.
101. Scope.
- (a) Proceedings generally.
  - (b) Rules of privilege.
  - (c) Rules inapplicable.
102. Purpose and construction.
103. Rulings on evidence.
- (a) Effect of erroneous ruling.
    - (1) Objection.
    - (2) Offer of proof.
  - (b) Record of offer and ruling.
  - (c) Hearing of the jury.
  - (d) Plain error.
104. Preliminary questions of admissibility.
- (a) Questions of admissibility generally.
  - (b) Admissibility subject to a condition.
  - (c) Hearing of jury.
  - (d) Testimony by accused.
  - (e) Weight and credibility.
105. Limited admissibility.
106. Remainder of or related acts, writings, or statements.

ARTICLE II. JUDICIAL NOTICE

201. Judicial notice of facts.
- (a) Scope of rule.
  - (b) Kinds of facts.
  - (c) When discretionary.
  - (d) When mandatory.
  - (e) Opportunity to be heard.
  - (f) Time of taking notice.
  - (g) Instructing the jury.
202. Judicial notice of law.
- (a) Scope of rule.
  - (b) Kinds of law.

## RULES OF EVIDENCE

- (c) When discretionary.
- (d) When mandatory.
- (e) Opportunity to be heard.
- (f) Time of taking notice.
- (g) Question for the court.

### ARTICLE III. PRESUMPTIONS

- 301. Presumptions in general.
  - (a) Presumption defined.
  - (b) Classification and effect of presumptions.
  - (c) Inconsistent presumptions.
- 302. Applicability of federal law in civil cases.

### ARTICLE IV. RELEVANCY AND ITS LIMITS

- 401. Definition of relevant evidence.
- 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.
- 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.
- 404. Character evidence not admissible to prove conduct, exceptions; other crimes; character in issue.
  - (a) Character evidence generally.
    - (1) Character of accused.
    - (2) Character of victim.
    - (3) Character of witness.
  - (b) Other crimes, wrongs, acts.
  - (c) Character in issue.
- 405. Methods of proving character.
  - (a) Reputation or opinion.
  - (b) Specific instances of conduct.
- 406. Habit; routine practice.
  - (a) Habit and routine practice defined.
  - (b) Admissibility.
  - (c) Method of proof.
- 407. Subsequent remedial measures.
- 408. Compromise and offers to compromise.
- 409. Payment of expenses.
- 410. Offer to plead guilty; nolo contendere; withdrawn plea of guilty.
- 411. Liability insurance.

### ARTICLE V. PRIVILEGES

- 501. Privileges recognized only as provided.

## RULES OF EVIDENCE

### 502. Identity of informer.

- (a) Rule of privilege.
- (b) Who may claim the privilege.
- (c) Exceptions and limitations.
  - (1) Voluntary disclosure; informer a witness.
  - (2) Testimony on relevant issue.

### 503. Waiver of privilege by voluntary disclosure.

- (a) General rule.
- (b) Joint holders.

### 504. Privileged matter disclosed under compulsion or without opportunity to claim the privilege.

### 505. Comment upon or inference from claim of privilege.

## ARTICLE VI. WITNESSES

### 601. Competency in general; disqualification.

- (a) General rule competency.
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**Rule 100. Short title.**

These rules may be known and cited as the Montana Rules of Evidence.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.      **Effective Date**

The effective date for implementation of the Rules of Evidence is July 1, 1977, for all trials held thereafter.



**Rule 101. Scope.**

(a) Proceedings generally. These rules govern all proceedings in all courts in the state of Montana with the exceptions stated in this rule.

(b) Rules of privilege. The rules with respect to privileges found in Article V apply at all stages of all actions, cases and proceedings.

(c) Rules inapplicable. The rules (other than those with respect to privileges) do not apply in the following situations:

(1) Preliminary questions of fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104(a).

(2) Grand jury. Proceedings before grand juries.

(3) Miscellaneous proceedings. Proceedings for extradition or rendition; preliminary examinations and proceedings on applications for leave to file informations in criminal cases; sentencing; dispositional hearings in youth court proceedings; granting or revoking probation or parole; issuance of warrants for arrest, criminal summonses and notices to appear, and search warrants; and proceedings with respect to release on bail or otherwise.

(4) Summary proceedings. Proceedings, other than motions for summary judgment, where the court is authorized by law to act summarily.

(5) Other miscellaneous proceedings. Ex parte matters; and proceedings, when authorized by law, which are uncontested or nonadversary.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

**Rule 102. Purpose and construction.**

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

**Rule 103. Rulings on evidence.**

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of the jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

#### **Rule 104. Preliminary questions of admissibility.**

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court. In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Admissibility subject to a condition. Except as otherwise provided by law, when the admissibility of evidence depends upon proof of other connecting facts, the court may admit such evidence subject to the condition that further evidence be introduced sufficient to support a finding of those connecting facts. The order of proof may be regulated by the sound discretion of the court.

(c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests.

(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.

(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

#### **Rule 105. Limited admissibility.**

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

#### **Rule 106. Remainder of or related acts, writings, or statements.**

(a) When part of an act, declaration, conversation, writing or recorded statement or series thereof is introduced by a party:

(1) an adverse party may require him at that time to introduce any other part of such item or series thereof which ought in fairness to be considered at that time; or

(2) an adverse party may inquire into or introduce any other part of such item of evidence or series thereof.

(b) This rule does not limit the right of any party to cross-examine or further develop as part of his case matters covered by this rule.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

## ARTICLE II. JUDICIAL NOTICE

- Rule 201. Judicial notice of facts.  
202. Judicial notice of law.

### Rule 201. Judicial notice of facts.

(a) Scope of rule. This rule governs judicial notice of all facts.

(b) Kinds of facts. A fact to be judicially noticed must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.

(c) When discretionary. A court may take judicial notice, whether requested or not.

(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing the jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

### Rule 202. Judicial notice of law.

(a) Scope of rule. This rule governs judicial notice of law.

(b) Kinds of law. Law includes but is not limited to the following:

(1) The common law, constitutions and statutes of the United States and of this and every other state, territory and jurisdiction of the United States;

(2) Duly enacted ordinances and regulations of governmental divisions of this state, including their charters;

(3) Regulations and legislative enactments issued by or under authority of the United States and of this and any state of the United States by or for their agencies or administrations;



(4) Official acts of the legislative, executive, and judicial departments of the United States and of this and any state of the United States;

(5) Private acts and resolutions of the Congress of the United States and of the legislature of this state;

(6) Records of any court of this state or of any court of record of the United States or any court of record of any state of the United States;

(7) Rules of practice and procedure of any court of this state or of any court of record of the United States or any court of record of any state of the United States;

(8) The law of foreign nations;

(9) International law;

(10) Maritime law;

(11) The seals of office of the officers of government in the legislative, executive, and judicial departments of government of the United States and of this and every other state, territory and jurisdiction of the United States, of any foreign jurisdiction recognized by the executive power of the United States, and of notaries public.

(c) When discretionary. A court may take judicial notice of the law listed in parts 2-10 of Rule 202(b) or other law, whether requested or not. The court may inform itself of any law in such manner as it may deem proper and the court may call upon counsel to aid it in obtaining such information.

(d) When mandatory. A court shall take judicial notice:

(1) of the common law, constitutions and statutes of the United States and of this and every other state, territory and jurisdiction of the United States; and

(2) of any other law when requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the law noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice.

(1) Judicial notice of the laws of this state and of the United States may be taken at any stage of the proceedings.

(2) Any party may present to the judge or court any admissible evidence of law. To enable a party to offer evidence of the law other than of this state and of the United States or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse party either in the pleadings or otherwise.

(g) Question for the court. Except as otherwise provided by law, the determination of law shall be made by the court.

History: En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

## ARTICLE III. PRESUMPTIONS

Rule 301. Presumptions in general.

302. Applicability of federal law in civil cases.

**Rule 301. Presumptions in general.**

(a) Presumption defined. A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action or proceeding.

(b) Classification and effect of presumptions.

(1) Conclusive presumptions are presumptions that are specifically declared conclusive by statute. Conclusive presumptions may not be controverted.

(2) All presumptions, other than conclusive presumptions, are disputable presumptions and may be controverted. A disputable presumption may be overcome by a preponderance of evidence contrary to the presumption. Unless the presumption is overcome, the trier of fact must find the assumed fact in accordance with the presumption.

(c) Inconsistent presumptions. If presumptions are inconsistent the court shall apply the presumption that is founded upon weightier considerations of public policy. If considerations of public policy are of equal weight the court shall disregard both presumptions.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

**Rule 302. Applicability of federal law in civil cases.**

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which federal law supplies the rule of decision is determined in accordance with federal law.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

## ARTICLE IV. RELEVANCY AND ITS LIMITS

Rule 401. Definition of relevant evidence.

402. Relevant evidence generally admissible; irrelevant evidence inadmissible.

403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

404. Character evidence not admissible to prove conduct, exceptions; other crimes; character in issue.

405. Methods of proving character.

406. Habit; routine practice.

407. Subsequent remedial measures.

408. Compromise and offers to compromise

409. Payment of expenses.

410. Offer to plead guilty; nolo contendere; withdrawn plea of guilty.

411. Liability insurance.

**Rule 401. Definition of relevant evidence.**

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evi-

dence. Relevant evidence may include evidence bearing upon the credibility of a witness or hearsay declarant.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

**Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.**

All relevant evidence is admissible, except as otherwise provided by constitution, statute, these rules, or other rules applicable in the courts of this state. Evidence which is not relevant is not admissible.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

**Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.**

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

**Rule 404. Character evidence not admissible to prove conduct, exceptions; other crimes; character in issue.**

(a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same.

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case or in an assault case where the victim is incapable of testifying to rebut evidence that the victim was the first aggressor.

(3) Character of witness. Evidence of the character of a witness, as provided in Article VI.

(b) Other crimes, wrongs, acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(c) Character in issue. Evidence of a person's character or a trait of his character is admissible in cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.



**Rule 405. Methods of proving character.**

(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, or where the character of the victim relates to the reasonableness of force used by the accused in self defense, proof may also be made of specific instances of his conduct.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

**Rule 406. Habit; routine practice.**

(a) Habit and routine practice defined. A habit is a person's regular response to a repeated specific situation. A routine practice is a regular course of conduct of a group of persons or an organization.

(b) Admissibility. Evidence of habit or of routine practice, whether corroborated or not, and regardless of the presence of eyewitnesses, is relevant to prove that conduct on a particular occasion was in conformity with the habit or routine practice.

(c) Method of proof. Habit or routine practice may be proved by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

**Rule 407. Subsequent remedial measures.**

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

**Rule 408. Compromise and offers to compromise.**

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

**Rule 409. Payment of expenses.**

Evidence of payment of expenses occasioned by an injury or occurrence is not admissible to prove liability.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

**Rule 410. Offer to plead guilty; nolo contendere; withdrawn plea of guilty.**

Evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal action, case, or proceeding against the person who made the plea or offer. This rule shall not apply to the introduction of voluntary and reliable statements made in court on the record in connection with any of the foregoing pleas or offers where offered for impeachment purposes or in a subsequent prosecution of the declarant for perjury or false statement.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

**Rule 411. Liability insurance.**

Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

## ARTICLE V. PRIVILEGES

- Rule 501. Privileges recognized only as provided.**
- 502. Identity of informer.
  - 503. Waiver of privilege by voluntary disclosure.
  - 504. Privileged matter disclosed under compulsion or without opportunity to claim the privilege.
  - 505. Comment upon or inference from claim of privilege.

**Rule 501. Privileges recognized only as provided.**

Except as otherwise provided by constitution, statute, these rules, or other rules applicable in the courts of this state, no person has a privilege to:

- (1) refuse to be a witness;
- (2) refuse to disclose any matter;

## WAIVER OF PRIVILEGE BY VOLUNTARY DISCLOSURE Rule 503(b)

(3) refuse to produce any object or writing; or

(4) prevent another from being a witness or disclosing any matter or producing any object or writing.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

### Rule 502. Identity of informer.

(a) Rule of privilege. The United States or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law.

(b) Who may claim the privilege. The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished.

(c) Exceptions and limitations.

(1) Voluntary disclosure; informer a witness. No privilege exists under this rule if the identity of the informer or his interest in the subject matter of his communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness for the public entity.

(2) Testimony on relevant issue. If it appears in the case that an informer may be able to give testimony relevant to any issue in a criminal case or to a fair determination of a material issue on the merits in a civil case to which a public entity is a party, and the public entity invokes the privilege, the court shall give the public entity an opportunity to show facts relevant to determining whether the informer can, in fact, supply that testimony.

If the Court finds that the informer should be required to give the testimony, and the public entity elects not to disclose his identity, the court on motion of the defendant in a criminal case shall dismiss the charges to which the testimony would relate, and the court may do so on its own motion. In civil cases, the court may make any order that justice requires.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

### Rule 503. Waiver of privilege by voluntary disclosure.

(a) General rule. A person upon whom these rules confer a privilege against disclosure waives the privilege if he or his predecessor while the holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged.

(b) Joint holders. Where two or more persons are joint holders of a privilege, a waiver of the right of a particular joint holder to claim the privilege does not affect the right of another joint holder to claim the privilege.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.



**Rule 504. Privileged matter disclosed under compulsion or without opportunity to claim the privilege.**

A claim of privilege is not defeated by a disclosure which was (a) compelled erroneously or (b) made without opportunity to claim the privilege.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

**Rule 505. Comment upon or inference from claim of privilege.**

The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by the court or counsel. No inference may be drawn therefrom.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

## ARTICLE VI. WITNESSES

- Rule 601. Competency in general; disqualification.  
602. Lack of personal knowledge.  
603. Oath or affirmation.  
604. Interpreters.  
605. Competency of judge as witness.  
606. Competency of juror as witness.  
607. Who may impeach; party not bound by testimony.  
608. Evidence of character and conduct of witness.  
609. Impeachment by evidence of conviction of crime.  
610. Religious beliefs or opinions.  
611. Mode and order of interrogation and presentation; re-examination and recall; confrontation.  
612. Writings used to refresh memory.  
613. Prior statements of witnesses.  
614. Calling and interrogation of witnesses by court.  
615. Exclusion of witnesses.

**Rule 601. Competency in general; disqualification.**

(a) General rule competency. Every person is competent to be a witness except as otherwise provided in these rules.

(b) Disqualification of witnesses. A person is disqualified to be a witness if the court finds that (1) the witness is incapable of expressing himself concerning the matter so as to be understood by the judge and jury either directly or through interpretation by one who can understand him or (2) the witness is incapable of understanding the duty of a witness to tell the truth.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

**Rule 602. Lack of personal knowledge.**

A witness may not testify as to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

**Rule 603. Oath or affirmation.**

Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

**Rule 604. Interpreters.**

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

**Rule 605. Competency of judge as witness.**

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

**Rule 606. Competency of juror as witness.**

(a) At the trial. A member of the jury may not be called or testify as a witness before that jury in the trial of the case in which he is sitting as a juror. If he is called to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent or dissent from the verdict or indictment or concerning his mental processes in connection therewith. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

However, as an exception to this subdivision, a juror may testify and an affidavit or evidence of any kind be received as to any matter or statement concerning only the following questions, whether occurring during the course of the jury's deliberations or not: (1) whether extraneous prejudicial information was improperly brought to the jury's attention; or (2) whether any outside influence was brought to bear upon any juror; or (3) whether any juror has been induced to assent to any general or special verdict, or finding on any question submitted to them by the court, by a resort to the determination of chance.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

**Rule 607. Who may impeach; party not bound by testimony.**

(a) The credibility of a witness may be attacked by any party, including the party calling him.

(b) No party is bound by the testimony of any witness.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

**Rule 608. Evidence of character and conduct of witness.**

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

**Rule 609. Impeachment by evidence of conviction of crime.**

For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is not admissible.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

**Rule 610. Religious beliefs or opinions.**

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by their nature his credibility is impaired or enhanced.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

**Rule 611. Mode and order of interrogation and presentation; re-examination and recall; confrontation.**

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination.

(1) Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness.



The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(2) Evidence developed on cross-examination may be considered by the trier of fact as proof of any fact in issue in the case.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

(d) Re-examination and recall. A witness may be re-examined as to the same matters to which he testified only in the discretion of the court, but without exception he may be reexamined as to any new matter brought out during cross-examination. After the examination of the witness has been concluded by all the parties to the action, that witness may be recalled only in the discretion of the court. This rule shall not limit the right of any party to recall a witness in rebuttal.

(e) Confrontation. Except as otherwise provided by constitution, statute, these rules, or other rules applicable to the courts of this state, at the trial of an action, a witness can be heard only in the presence and subject to the examination of all the parties to the action, if they choose to attend and examine.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

### **Rule 612. Writings used to refresh memory.**

If a witness uses a writing to refresh his memory for the purpose of testifying, either

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce into evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objection shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

**Rule 613. Prior statements of witnesses.**

(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

**Rule 614. Calling and interrogation of witnesses by court.**

(a) Calling by court. The court may, on its own motion or at the suggestion of a party, call witnesses and all parties are entitled to cross-examine witnesses thus called.

(b) Interrogation by court. The court may interrogate witnesses, whether called by itself or a party; provided, however, that in trials before a jury, the court's questioning must be cautiously guarded so as not to constitute express or implied comment.

(c) Objections. Objections to the calling of a witness by the court or to the interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

**Rule 615. Exclusion of witnesses.**

At the request of a party, the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

**ARTICLE VII. OPINIONS AND EXPERT TESTIMONY**

**Rule 701.** Opinion testimony by lay witnesses.

**702.** Testimony by experts.

**703.** Bases of opinion testimony by experts.

**704.** Opinions on ultimate issue.

**705.** Disclosure of facts or data underlying expert opinion.

**Rule 701. Opinion testimony by lay witnesses.**

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

**Rule 702. Testimony by experts.**

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

**Rule 703. Bases of opinion testimony by experts.**

The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in a particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

**Rule 704. Opinions on ultimate issue.**

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

**Rule 705. Disclosure of facts or data underlying expert opinion.**

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

**ARTICLE VIII. HEARSAY**

- Rule 801. Definitions.  
802. Hearsay rule.  
803. Hearsay exceptions: availability of declarant immaterial.  
804. Hearsay exceptions: declarant unavailable.  
805. Hearsay within hearsay.  
806. Attacking and supporting the credibility of declarant.

**Rule 801. Definitions.**

The following definitions apply under this article:



(a) Statement. A statement is (1) an oral or written assertion or (2) non-verbal conduct of a person, if it is intended by him as an assertion.

(b) Declarant. A declarant is a person who makes a statement.

(c) Hearsay. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if—

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of subsequest fabrication, improper influence or motive, or (C) one of identification of a person made after perceiving him; or

(2) Admission by party-opponent. The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of that relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

### **Rule 802. Hearsay rule.**

Hearsay is not admissible except as otherwise provided by statute, these rules, or other rules applicable in the courts of this state.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

### **Rule 803. Hearsay exceptions: availability of declarant immaterial.**

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then-existing mental, emotional, or physical condition. A statement of the declarant's then-existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed.

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and

describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnosis, made at or near the time of the acts, events, conditions, opinions, or diagnosis, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports. To the extent not otherwise provided in this paragraph, records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. The following are not within this exception to the hearsay rule: (i) investigative reports by police and other law enforcement personnel; (ii) investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party; (iii) factual findings offered by the government in criminal cases; (iv) factual findings resulting from special investigation of a particular complaint, case, or incident; and (v) any matter as to which the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the non-

occurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement or data compilation, or entry.

(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents. Statements in a document in existence twenty years or more, the authenticity of which is established.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history. Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce or dissolution of marriage, death, legitimacy, relation-



ship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) Reputation as to character. Reputation of a person's character among his associates or in the community.

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of *nolo contendere*), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the prosecution in a criminal prosecution, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family, or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

**Rule 804. Hearsay exceptions: declarant unavailable.**

(a) Definition of unavailability. Unavailability as a witness includes situations in which the declarant—

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of his statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, (A) in civil actions and proceedings, at the instance of or against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered; and (B) in criminal actions and proceedings, if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, and redirect examination.

(2) Statement under belief of impending death. A statement made by a declarant while believing that his death was imminent, concerning the cause or circumstance of what he believed to be his impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another or to make him an object of hatred, ridicule, or disgrace, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce or dissolution of marriage, legitimacy, relationship by blood, or family history, even though the declarant had no means of acquiring the personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

#### **Rule 805. Hearsay within hearsay.**

Hearsay included within hearsay is not excluded under the hearsay rule if each part of a combined statement conforms with an exception to the hearsay rule provided in these rules.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

#### **Rule 806. Attacking and supporting the credibility of declarant.**

When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked and, if attacked, may be supported by any evidence which would be admissible for those purposes if the declarant

had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

## ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

Rule 901. Requirement of authentication or identification.

902. Self-authentication.

903. Subscribing witness' testimony unnecessary.

### Rule 901. Requirement of authentication or identification.

(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification. Identification of a voice, whether heard first-hand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.



(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Method provided by statute or rule. Any method of authentication or identification provided by statute, these rules, or other rules applicable in the courts of this state.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

### **Rule 902. Self-authentication.**

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic public documents not under seal. Except as otherwise provided by statute, a document purporting to bear the signature in his official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign public documents. A document purporting to be executed or attested in his official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution of attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If a reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded

or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) or complying with any law of the United States or of this State.

(5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.

(7) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) Acknowledged documents. Documents accompanied by a certificate of acknowledgement executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgements.

(9) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) Presumptions created by law. Any signature, document, or other matter declared by any law of the United States or of this state to be presumptively or prima facie genuine or authentic.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

### **Rule 903. Subscribing witness' testimony unnecessary.**

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

## **ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS**

- Rule 1001. Definitions.
- 1002. Requirement of original.
- 1003. Admissibility of duplicates, copies of certain entries.
- 1004. Admissibility of other evidence of contents.
- 1005. Public records.
- 1006. Summaries.
- 1007. Testimony or written admission of party.
- 1008. Functions of court and jury.

### **Rule 1001. Definitions.**

For purposes of this article the following definitions are applicable:

(1) Writings and recordings. Writings and recordings consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) Photographs. Photographs include still photographs, x-ray films, video tapes, and motion pictures.

(3) Original. An original of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An original of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an original.

(4) Duplicate. A duplicate is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original.

(5) Copies of entries in the regular course of business. A copy of an entry in the regular course of business consists of an entry in a writing kept in the regular course of business copied from another such writing by manual or mechanical means at or near the time of the transaction.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

#### **Rule 1002. Requirement of original.**

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided by statute, these rules, or other rules applicable in the courts of this state.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

#### **Rule 1003. Admissibility of duplicates, copies of certain entries.**

A duplicate, or copy of an entry in the regular course of business as defined in Rule 1001(5), is admissible to the same extent as an original unless: (1) a genuine question is raised as to the authenticity of the original; or (2) in the circumstances it would be unfair to admit the duplicate or copy of an entry in the regular course of business in lieu of the original; or (3) otherwise provided by statute.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

#### **Rule 1004. Admissibility of other evidence of contents.**

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if—

(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or

(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a sub-



ject of proof at the hearing, and he does not produce the original at the hearing; or

(4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

#### **Rule 1005. Public records.**

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

#### **Rule 1006. Summaries.**

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

#### **Rule 1007. Testimony or written admission of party.**

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by his written admission, without accounting for the nonproduction of the original.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

#### **Rule 1008. Functions of court and jury.**

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is for the court to determine in accordance with the provisions of Rule 104.

**History:** En. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.



# MONTANA CRIMINAL CODE OF 1973

## **TITLE 94**

**1947 REVISED CODES OF MONTANA**

**Effective January 1, 1974**

### **Containing**

**TITLE 94, REVISED CODES OF MONTANA, THE  
CRIMINAL CODE OF 1973, AS AMENDED THROUGH  
THE 45TH LEGISLATURE IN 1977**

**THE ALLEN SMITH COMPANY**  
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## FOREWORD

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This pamphlet contains all of Title 94, Revised Codes of Montana, the Criminal Code of 1973, as enacted or amended by Chapter 513, Laws of 1973, and as amended through the 1977 Session of the Legislature. The new Criminal Code was prepared by the Criminal Law Study Commission created by Chapter 103, Laws of 1963, acting under the chairmanship of the Honorable Wesley Castle, Associate Justice of the Supreme Court of Montana. The Code became effective January 1, 1974.

Title 94 contained herein completely replaces the original Title 94 of the Revised Codes of Montana, 1947, as heretofore amended. As a result of Chapter 513, Laws of 1973, every section previously contained in old Title 94 is either repealed, renumbered in accordance with the arrangement and section-numbering system of new Title 94, or transferred to some other title of the Revised Codes.

Three different 1973 acts that were not part of the Criminal Code of 1973 properly belong in the title on criminal offenses. The compiler has given these acts section numbers that are consistent with the arrangement and section-numbering system of the new Criminal Code, and they appear in this pamphlet.

Included in this pamphlet are Source notes and Commission Comments on the various sections of the new Criminal Code. These notes and comments were prepared by the Criminal Law Study Commission and have been revised and edited by Professor Larry M. Elison, School of Law, University of Montana, who served as Vice-Chairman and Reporter of the Commission.

A Cross-Reference Table appears in this pamphlet, beginning on page 169. This Table, based on a table prepared by the Criminal Law Study Commission, shows, for each section of old Title 94, either the place to which the section has been transferred by renumbering or the sections either in new Title 94 or other titles of the Revised Codes which cover the same subject matter.

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## TITLE 94

### CRIMINAL CODE

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## CHAPTER 1

### GENERAL PRELIMINARY PROVISIONS

- Section 94-1-101. Short title.
- 94-1-102. General purposes and principles of construction.
- 94-1-103. Application to offenses committed before and after enactment.
- 94-1-104. Other limitations on applicability.
- 94-1-105. Classification of offenses.
- 94-1-106. General time limitations.
- 94-1-107. Periods excluded from limitation.

**94-1-101. Short title.** This act shall be known and may be cited as the "Criminal Code of 1973."

**History:** En. 94-1-101 by Sec. 1, Ch. 513, Code, to codify and generally revise the statutes concerning criminal offenses; and L. 1973. providing an effective date.

#### Title of Act

An act creating a Montana Criminal

**94-1-102. General purposes and principles of construction.** (1) The general purposes of the provisions governing the definition of offenses are:

(a) to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens harm to individual or public interests;

(b) to safeguard conduct that is without fault from condemnation as criminal;

(c) to give fair warning of the nature of the conduct declared to constitute an offense;

(d) to differentiate on reasonable grounds between serious and minor offenses.

(2) The rule of the common law, that penal statutes are to be strictly construed, has no application to this code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its object and to promote justice.

**History:** En. 94-1-102 by Sec. 1, Ch. 513, L. 1973.

**Source:** Subdivisions (1) (a) to (1) (d) substantially the same as Illinois Criminal Code, Chapter 38, section 1-2. Subsection (2) is identical to Revised Codes of Montana 1947, section 94-101.

#### Commission Comment

This section expresses the legislative purpose of the code and provides a convenient reference for the interpretation of its more specific provisions. See also the provisions of the Bill of Rights of the Montana constitution [Art. II, 1972 Constitution] which outline the basic concepts of criminal law.

### DECISIONS UNDER FORMER LAW

#### Liberal Construction

Under section 12-202 and former section 94-101, the rule that statutes in derogation of common law be strictly construed did not apply to code provisions, liberal construction being the rule as to all; prior decisions strictly construing a repealed section relating to the incurrance of liability for debts of corporation by directors for failure to file annual report with county, were overruled. *Continental Supply Co. v. Abell*, 95 M 148, 24 P 2d 133.

Sections 59-518 to 59-520, defining "nepotism" and prohibiting public officers, boards or commissions from appointing relatives to a position of trust or emolument, and providing punishment by fine and imprisonment in the county jail, were not strictly construed in view of former section 94-101. *State ex rel. Kurth v. Grinde*, 96 M 608, 614, 32 P 2d 15.

#### 94-1-103. Application to offenses committed before and after enactment.

(1) The provisions of this code apply to any offense defined in this code and committed after January 1, 1974.

(2) Unless otherwise expressly provided or unless the context otherwise requires, the provisions of this title and Title 95 govern the construction of and punishment for any offense defined outside of this code and committed after January 1, 1974, as well as the construction and application of any defense to a prosecution for such an offense.

(3) The provisions of this code do not apply to any offense defined outside of this code and committed before January 1, 1974. Such an offense must be construed and punished according to the provisions of law existing at the time of the commission thereof in the same manner as if this code had not been enacted.

**History:** En. 94-1-103 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 7, Ch. 359, L. 1977.

**Source:** Substantially the same as New York Penal Code, Title 39, section 5.05; also derived from Revised Codes of Montana 1947, section 94-103.

#### Commission Comment

This section is intended to provide for the transition from the old Criminal Code to the new Criminal Code. The provisions of the new Criminal Code apply only to offenses committed after its effective date

[January 1, 1974]. See also Section 33 [Chapter 513, Laws of 1973 (Effective Date note following sec. 94-8-431)].

#### Amendments

The 1977 amendment substituted "January 1, 1974" throughout the section for references to the effective date of this code; substituted "this title and Title 95" in subsection (2) for "this code"; and

made minor changes in phraseology and punctuation.

#### Receiving Stolen Property

Defendant found in possession of stolen property in 1974 could not be prosecuted under the old law since the offense of possession did not relate back to the date of the theft. *State v. Jimison*, — M —, 540 P 2d 315.

**94-1-104. Other limitations on applicability.** (1) This code does not bar, suspend, or otherwise affect any right or liability to damages, penalty, forfeiture, or other remedy authorized by law to be recovered and the civil injury is not merged into the offense.

(2) No conduct constitutes an offense unless it is described as an offense in this code or in another statute of this state. However this provision does not affect the power of a court to punish for contempt or to employ any sanction authorized by law for the enforcement of an order, civil judgment or decree.

**History:** En. 94-1-104 by Sec. 1, Ch. 513, L. 1973.

**Source:** Subsection (1) identical to Illinois Criminal Code, Chapter 38, section 1-4; subsection (2) identical to Illinois Criminal Code, Chapter 38, section 1-3; also derived from Revised Codes of Montana 1947, sections 94-103, 94-106 and 94-108.

#### Commission Comment

It has been contended that the victim of a criminal offense should be denied civil relief until he has performed his public duty to prosecute the offender. The English courts developed the rule that a civil action cannot be maintained until after prosecution, if the offense involved a felony.

Legislatures in a number of states have reached the opposite conclusion declaring the criminal and civil aspects to be independent. See R. C. M. 1947, section 94-106. This appears to be the prevailing American rule and is continued by this section.

Subsection (2) is intended to complete the process of replacing the common law definitions of offenses with statutory definitions—a process which has continued for many years.

The language that the provision does not affect the power of a court to "employ any sanction authorized by law" is intended to preserve the power of courts of justice to punish for contempt and the authority of properly constituted courts of justice to act as courts martial. See R. C. M. 1947, section 94-108.

### DECISIONS UNDER FORMER LAW

#### Ordinance Violation

An action by a city instituted in its police court by the filing of a complaint charging a violation of one of its ordinances, and seeking the imposition of a fine, was criminal in its nature; the court acquired jurisdiction over defendant by the issuance and service of a warrant of arrest. *State ex rel. Marquette v. Police Court*, 86 M 297, 309, 283 P 430, modifying *City of Bozeman v. Nelson*, 73 M 147, 237 P 528.

#### Removal from Office

A proceeding for the summary removal of a county attorney for misconduct, even though instituted by a private person, was a public proceeding, and, though it was summary in its nature, was classed as a prosecution for crime under former section 94-112. *State ex rel. McGrade v. District Court*, 52 M 371, 373, 157 P 1157.

**94-1-105. Classification of offenses.** (1) For the determination of the court's jurisdiction at the commencement of the action and for the determination of the commencement of the period of limitations, the offense shall be designated a felony or misdemeanor based upon the maximum potential sentence which could be imposed by statute.



(2) An offense defined by any statute of this state other than this code shall be classified as provided in this section and the sentence that may be imposed upon conviction thereof shall be governed by this title and Title 95.

**History:** En. 94-1-105 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 8, Ch. 359, L. 1977.

**Source:** New.

#### Commission Comment

The actual sentence imposed upon conviction determines the classification of the offense. The potential sentence determines the court's jurisdiction at the commencement of the action and is determinative of the commencement of the period of limitations. The section is at least partially contra the holding in *State v. Atlas*, 75 M 547, 551, 244 P 477 (1926), in which the Montana supreme court held that the potential sentence determines the grade of the crime.

#### Amendments

The 1977 amendment substituted "this title and Title 95" at the end of subsection (2) for "this code."

#### Convictions in Other Jurisdictions

In construing state statutes relating to voter disqualification, a Montana voter cannot be denied the right to vote because of conviction of an offense in federal court that would not be a felony by Montana statutory definition. *Melton v. Oleson*, — M —, 530 P 2d 466, overruling *State ex rel. Anderson v. Lousek*, 91 M 448, 8 P 2d 791.

### DECISIONS UNDER FORMER LAW

#### Concurrent Sentences

Where defendant was convicted of felony under first portion of consolidated information and of misdemeanor under second portion and the trial court adjudged that the sentences be served concurrently, the felony sentence was to be served in state prison with credit for misdemeanor fine to be given at the same time, and any remaining time under the misdemeanor at end of the state prison term was to be served in county jail. *State v. Bogue*, 142 M 459, 384 P 2d 749.

#### Federal Rule

Under federal law, the maximum potential punishment determines whether an offense constitutes a felony or misdemeanor as contra-distinguished from the prevailing Montana rule under which crimes are classified as felonies or misde-

meanors by the punishment actually imposed. *State ex rel. Anderson v. Fousek*, 91 M 448, 8 P 2d 791, overruled on other grounds, — M —, 530 P 2d 466.

#### Limitation of Actions

The potential maximum sentence was determinative of the grade of the crime until sentence was imposed where the offense was neither divisible into degrees nor inclusive of lesser offenses and was punishable as either a felony or misdemeanor in the discretion of the court or jury; if the sentence imposed was other than imprisonment in the state prison the offense was considered a misdemeanor under former section 94-114, but the reduction was not retroactive so as to make the misdemeanor period of limitations applicable. *State v. Atlas*, 75 M 547, 244 P 477.

**94-1-106. General time limitations.** (1) A prosecution for criminal homicide may be commenced at any time.

(2) Except as otherwise provided by law, prosecutions for other offenses are subject to the following periods of limitation:

(a) a prosecution for a felony must be commenced within 5 years after it is committed;

(b) a prosecution for a misdemeanor must be commenced within 1 year after it is committed.

(3) The period prescribed in subsection (2) is extended in a prosecution for theft involving a breach of fiduciary obligation to an aggrieved person as follows:

(a) if the aggrieved person is a minor or incompetent, during the minority or incompetency or within 1 year after the termination thereof;

(b) in any other instance, within 1 year after the discovery of the offense by the aggrieved person or by a person who has legal capacity to represent an aggrieved person or has a legal duty to report the offense and is not himself a party to the offense or, in the absence of such discovery, within 1 year after the prosecuting officer becomes aware of the offense.

(4) An offense is committed either when every element occurs or, when the offense is based upon a continuing course of conduct, at the time when the course of conduct is terminated. Time starts to run on the day after the offense is committed.

(5) A prosecution is commenced either when an indictment is found or an information or complaint is filed.

**History:** En. 94-1-106 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 9, Ch. 359, L. 1977.

**Source:** Identical to Revised Codes of Montana 1947, sections 94-5702 and 94-5703. Also derived from Revised Codes of Montana 1947, section 94-5701 and Illinois Criminal Code, Chapter 38, sections 3-5 and 3-6.

#### Commission Comment

This section describes the general time limitations on prosecutions; the extension thereof under certain conditions; and the exclusion of certain periods in the calculation of limitations.

Subsection (1) continues the present Montana provision that no time limit exists with respect to homicide.

Subsection (2) similarly preserves the present general time limitations in Montana of five (5) years for all other felonies and one year for misdemeanors.

Subsection (3) is designed to permit increases in the general time limitations with respect to certain offenses which are capable of being readily concealed by the offender, from both the victim and the law enforcing authorities, over substantial periods of time and beyond the general limitations applicable to those offenses.

Subsection (4) states the general rule that the period of limitation does not start in the case of a "continuing offense" until the last act of the offense is performed. The rule would be applicable to a series

of related acts constituting a single course of conduct extended over a period of time, often occurring in cases of embezzlement, conspiracy, bigamous cohabitation, and nuisance.

When the limitation period has not run on the offense charged, but has run on an offense included therein, the general rule is that the defendant cannot be convicted of the included offense, since to hold otherwise would permit the prosecutor, by charging a more serious inclusive offense not barred by the limitation, to circumvent the limitation on the lesser offense. (*State v. Chevlin*, 284 SW 2d 563 (Mo. 1955)).

Unless time is a material ingredient in the offense or in charging the same, it is only necessary to prove that it was committed prior to the finding of the indictment or filing the information or complaint. (*State v. Rogers*, 31 M 1, 4, 77 P 293). The general statute of limitations applicable to misdemeanors should not be enlarged beyond what its plain language imports, and whenever the exceptions embodied in subsection (3) are invoked, the case should clearly and unequivocally fit within the exceptions. (*State v. Clemens*, 40 M 567, 569, 107 P 896).

#### Amendments

The 1977 amendment substituted "by law" in subsection (2) for "in this code"; and made minor changes in phraseology, punctuation and style.

### DECISIONS UNDER FORMER LAW

#### Exceptions

Former section 94-5703 was a general statute of limitations, applicable to misdemeanors, and an exception to it could not be enlarged beyond what its plain language imported; to invoke the exception, the case must clearly and unequivocally fall within it. *State v. Clemens*, 40 M 567, 569, 107 P 896.

#### Felony or Misdemeanor

The maximum potential sentence determines the grade of the crime until

sentence is imposed; under former section 94-114 the imposition of a sentence other than imprisonment in state prison reduced the crime to a misdemeanor in cases where the offense was neither divisible into degrees nor inclusive of lesser offenses and punishment was within the discretion of the court or jury; but this did not operate retroactively so as to deprive the court of jurisdiction by making the misdemeanor limitations period applicable. *State v. Atlas*, 75 M 547, 244 P 477.

**94-1-107. Periods excluded from limitation.** The period of limitation does not run:

(1) during any period in which the offender is not usually and publicly resident within this state or is beyond the jurisdiction of this state; or

(2) during any period in which the offender is a public officer and the offense charged is theft of public funds while in public office; or

(3) during a prosecution pending against the offender for the same conduct, even if the indictment, complaint or information which commences the prosecution is dismissed.

**History:** En. 94-1-107 by Sec. 1, Ch. 513, L. 1973.

**Source:** Substantially the same as Revised Codes of Montana 1947, section 94-5704 and Illinois Criminal Code, Chapter 38, section 3-7.

**Commission Comment**

Certain occurrences should stop the period from running. Subsection (1) tolls

the statute for the offender who is absent from this state, or absents himself from his usual place of abode and makes some effort to conceal himself.

Subsection (3) is intended to preserve the substance of the former Montana provision which tolled that statute while proceedings were pending.

Note that the phrase "same conduct" is intentionally broad.

## DECISIONS UNDER FORMER LAW

### Circumstantial Evidence

In 1922, testimony that defendant had taken a trip to Ireland where he had visited several cities created an inference sufficient to establish that the defendant

had been absent from the state for at least twenty days, and satisfied the state's burden of proof under former section 94-5704. *State v. Knilians*, 69 M 8, 220 P 91.

## CHAPTER 2

### GENERAL PRINCIPLES OF LIABILITY

- Section 94-2-101.** General definitions.
- 94-2-102. Voluntary act.
- 94-2-103. General requirements of criminal act and mental state.
- 94-2-104. Absolute liability.
- 94-2-105. Causal relationship between conduct and result.
- 94-2-106. Accountability for conduct of another.
- 94-2-107. When accountability exists.
- 94-2-108. Separate conviction of person accountable.
- 94-2-109. Responsibility.
- 94-2-110. Substitutes for negligence and knowledge.
- 94-2-111. Consent as a defense.
- 94-2-112. Criminal responsibility of corporations.
- 94-2-113. Accountability for conduct of corporation.

**94-2-101. General definitions.** Unless otherwise specified in the statute, all words will be taken in the objective standard rather than in the subjective, and unless a different meaning plainly is required, the following definitions apply in this title:

(1) "Acts" has its usual and ordinary grammatical meaning and includes any bodily movement, any form of communication, and, where relevant, a failure or omission to take action.

(2) "Another" means a person or persons as defined in this code other than the offender.



(3) "Administrative proceeding" means any proceeding the outcome of which is required to be based on a record or documentation prescribed by law or in which a law or a regulation is particularized in its application to an individual.

(4) "Benefit" means gain or advantage or anything regarded by the beneficiary as gain or advantage, including benefit to any other person or entity in whose welfare he is interested but not an advantage promised generally to a group or class of voters as a consequence of public measures which a candidate engages to support or oppose.

(5) "Bodily injury" means physical pain, illness, or any impairment of physical condition and includes mental illness or impairment.

(6) "Cohabit" means to live together under the representation of being married.

(7) "Common scheme" means a series of acts or omissions motivated by a purpose to accomplish a single criminal objective or by a common purpose or plan which results in the repeated commission of the same offense or affects the same person or the same persons or the property thereof.

(8) "Conduct" means an act or series of acts and the accompanying mental state.

(9) "Conviction" means a judgment of conviction or sentence entered upon a plea of guilty or upon a verdict or finding of guilty of an offense rendered by a legally constituted jury or by a court of competent jurisdiction authorized to try the case without a jury.

(10) "Correctional institution" means the state prison, county or city jail, or other institution for the incarceration or custody of persons under sentence for offenses or awaiting trial or sentence for offenses.

(11) "Deception" means knowingly to:

(a) create or confirm in another an impression which is false and which the offender does not believe to be true;

(b) fail to correct a false impression which the offender previously has created or confirmed;

(c) prevent another from acquiring information pertinent to the disposition of the property involved;

(d) sell or otherwise transfer or encumber property, failing to disclose a lien, adverse claim, or other legal impediment to the enjoyment of the property, whether such impediment is or is not of value or is or is not a matter of official record; or

(e) promise performance which the offender does not intend to perform or knows will not be performed. Failure to perform standing alone is not evidence that the offender did not intend to perform.

(12) "Defamatory matter" means anything which exposes a person or a group, class, or association to hatred, contempt, ridicule, degradation, or disgrace in society or injury to his or its business or occupation.

(13) "Deprive" means to withhold property of another:

(a) permanently;

(b) for such a period as to appropriate a portion of its value;

(c) with the purpose to restore it only upon payment of reward or other compensation; or

(d) to dispose of the property and use or deal with the property so as to make it unlikely that the owner will recover it.

(14) "Deviate sexual relations" means sexual contact or sexual intercourse between two persons of the same sex or any form of sexual intercourse with an animal.

(15) "Felony" means an offense in which the sentence imposed upon conviction is death or imprisonment in the state prison for any term exceeding 1 year.

(16) "A frisk" is a search by an external patting of a person's clothing.

(17) "Forcible felony" means any felony which involves the use or threat of physical force or violence against any individual.

(18) "Government" includes any branch, subdivision, or agency of the government of the state or any locality within it.

(19) "Harm" means loss, disadvantage, or injury or anything so regarded by the person affected, including loss, disadvantage, or injury to any person or entity in whose welfare he is interested.

(20) "A house of prostitution" means any place where prostitution or promotion of prostitution is regularly carried on by one or more persons under the control, management, or supervision of another.

(21) "Human being" means a person who has been born and is alive.

(22) "An illegal article" is an article or thing which is prohibited by statute, rule, or order from being in the possession of a person subject to official detention.

(23) "Inmate" means a person who engages in prostitution in or through the agency of a house of prostitution.

(24) "Intoxicating substance" means any controlled substance as defined in chapter 3 of Title 54 and any alcoholic beverage including but not limited to any beverage containing  $\frac{1}{2}$  of 1% or more of alcohol by volume. The foregoing definition shall not extend to dealecoholized wine or to any beverage or liquid produced by the process by which beer, ale, port, or wine is produced if it contains less than  $\frac{1}{2}$  of 1% of alcohol by volume.

(25) "An involuntary act" means any act which is:

(a) a reflex or convulsion;

(b) a bodily movement during unconsciousness or sleep;

(c) conduct during hypnosis or resulting from hypnotic suggestion; or

(d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual.

(26) "Juror" means any person who is a member of any jury, including a grand jury, impaneled by any court in this state in any action or proceeding or by any officer authorized by law to impanel a jury in any action or proceeding. The term "juror" also includes a person who has been drawn or summoned to attend as a prospective juror.

(27) "Knowingly"—a person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware of his conduct or that the circumstance exists. A person acts know-

ingly with respect to the result of conduct described by a statute defining an offense when he is aware that it is highly probable that such result will be caused by his conduct. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence. Equivalent terms such as "knowing" or "with knowledge" have the same meaning.

(28) "Mentally defective" means that a person suffers from a mental disease or defect which renders him incapable of appreciating the nature of his conduct.

(29) "Mentally incapacitated" means that a person is rendered temporarily incapable of appreciating or controlling his conduct as result of the influence of an intoxicating substance.

(30) "Misdemeanor" means an offense in which the sentence imposed upon conviction is imprisonment in the county jail for any term or fine, or both, or the sentence imposed is imprisonment in the state prison for any term of 1 year or less.

(31) "Negligently"—a person acts negligently with respect to a result or to a circumstance described by a statute defining an offense when he consciously disregards a risk that the result will occur or that the circumstance exists or if he disregards a risk of which he should be aware that the result will occur or that the circumstance exists. The risk must be of such a nature and degree that to disregard it involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. Gross deviation means a deviation that is considerably greater than lack of ordinary care. Relevant terms such as "negligent" and "with negligence" have the same meaning.

(32) "Obtain" means:

(a) in relation to property, to bring about a transfer of interest or possession whether to the offender or to another; and

(b) in relation to labor or services, to secure the performance thereof.

(33) "Obtains or exerts control" includes but is not limited to the taking, carrying away, or sale, conveyance, transfer of title to, interest in, or possession of property.

(34) "Occupied structure" means any building, vehicle, or other place suited for human occupancy or night lodging of persons or for carrying on business whether or not a person is actually present. Each unit of a building consisting of two or more units separately secured or occupied is a separate occupied structure.

(35) "Offender" means a person who has been or is liable to be arrested, charged, convicted, or punished for a public offense.

(36) "Offense" means a crime for which a sentence of death or of imprisonment or fine is authorized. Offenses are classified as felonies or misdemeanors.

(37) "Official detention" means imprisonment resulting from a conviction for an offense, confinement for an offense, confinement of a person charged with an offense, detention by a peace officer pursuant to arrest, detention for extradition or deportation, or any lawful detention for the



purpose of the protection of the welfare of the person detained or for the protection of society. "Official detention" does not include supervision of probation or parole, constraint incidental to release on bail, or an unlawful arrest unless the person arrested employed physical force, a threat of physical force, or a weapon to escape.

(38) "Official proceeding" means a proceeding heard or which may be heard before any legislative, judicial, administrative, or other governmental agency or official authorized to take evidence under oath, including any referee, hearing examiner, commissioner, notary, or other person taking testimony or deposition in connection with such proceeding.

(39) "Other state" means any state or territory of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

(40) "Owner" means a person, other than the offender, who has possession of or any other interest in the property involved, even though such interest or possession is unlawful, and without whose consent the offender has no authority to exert control over the property.

(41) "Party official" means a person who holds an elective or appointive post in a political party in the United States by virtue of which he directs or conducts or participates in directing or conducting party affairs at any level of responsibility.

(42) "Peace officer" means any person who by virtue of his office or public employment is vested by law with a duty to maintain public order or to make arrests for offenses while acting within the scope of his authority.

(43) "Pecuniary benefit" is benefit in the form of money, property, commercial interests, or anything else the primary significance of which is economic gain.

(44) "Person" includes an individual, business association, partnership, corporation, government, or other legal entity and an individual acting or purporting to act for or on behalf of any government or subdivision thereof.

(45) "Physically helpless" means that a person is unconscious or is otherwise physically unable to communicate unwillingness to act.

(46) "Possession" is the knowing control of anything for a sufficient time to be able to terminate control.

(47) "Premises" includes any type of structure or building and any real property.

(48) "Property" means anything of value. Property includes, but is not limited to:

- (a) real estate;
- (b) money;
- (c) commercial instruments;
- (d) admission or transportation tickets;
- (e) written instruments which represent or embody rights concerning anything of value, including labor or services, or which are otherwise of value to the owner;
- (f) things growing on, affixed to, or found on land and things which are part of or affixed to any building;
- (g) electricity, gas, and water;

(h) birds, animals, and fish which ordinarily are kept in a state of confinement;

(i) food and drink, samples, cultures, microorganisms, specimens, records, recordings, documents, blueprints, drawings, maps, and whole or partial copies, descriptions, photographs, prototypes, or models thereof; and

(j) any other articles, materials, devices, substances, and whole or partial copies, descriptions, photographs, prototypes, or models thereof which constitute, represent, evidence, reflect, or record secret scientific, technical, merchandising, production, or management information or a secret designed process, procedure, formula, invention, or improvement.

(49) "Property of another" means real or personal property in which a person other than the offender has an interest which the offender has not authority to defeat or impair, even though the offender himself may have an interest in the property.

(50) "Public place" means any place to which the public or any substantial group thereof has access.

(51) "Public servant" means any officer or employee of government, including but not limited to legislators, judges, and firefighters and any person participating as a juror, advisor, consultant, administrator, executor, guardian, or court-appointed fiduciary. The term does not include witnesses. The term public servant includes one who has been elected or designated to become a public servant.

(52) "Purposely"—a person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is his conscious object to engage in that conduct or to cause that result. When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense. Equivalent terms such as "purpose" and "with the purpose" have the same meaning.

(53) "Serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement or protracted loss or impairment of the function or process of any bodily member or organ. It includes serious mental illness or impairment.

(54) "Sexual contact" means any touching of the sexual or other intimate parts of the person of another for the purpose of arousing or gratifying the sexual desire of either party.

(55) "Sexual intercourse" means penetration of the vulva, anus, or mouth of one person by the penis of another person, penetration of the vulva or anus of one person by any body member of another person, or penetration of the vulva or anus of one person by any foreign instrument or object manipulated by another person for the purpose of arousing or gratifying the sexual desire of either party. Any penetration, however slight, is sufficient.

(56) "Solicit" or "solicitation" means to command, authorize, urge, incite, request, or advise another to commit an offense.

(57) "State" or "this state" means the state of Montana, all the land and water in respect to which the state of Montana has either exclusive or concurrent jurisdiction, and the air space above such land and water.

(58) "Statute" means any act of the legislature of this state.

(59) "Stolen property" means property over which control has been obtained by theft.

(60) "A stop" is the temporary detention of a person that results when a peace officer orders the person to remain in his presence.

(61) "Tamper" means to interfere with something improperly, meddle with it, make unwarranted alterations in its existing condition, or deposit refuse upon it.

(62) "Threat" means a menace, however communicated, to:

(a) inflict physical harm on the person threatened or any other person or on property;

(b) subject any person to physical confinement or restraint;

(c) commit any criminal offense;

(d) accuse any person of criminal offense;

(e) expose any person to hatred, contempt, or ridicule;

(f) harm the credit or business repute of any person;

(g) reveal any information sought to be concealed by the person threatened;

(h) take action as an official against anyone or anything, withhold official action, or cause such action or withholding;

(i) bring about or continue a strike, boycott, or other similar collective action if the property is not demanded or received for the benefit of the groups which he purports to represent; or

(j) testify or provide information or withhold testimony or information with respect to another's legal claim or defense.

(63) (a) "Value" means the market value of the property at the time and place of the crime or, if such cannot be satisfactorily ascertained, the cost of the replacement of the property within a reasonable time after the crime. If the offender appropriates a portion of the value of the property, the value shall be determined as follows:

(i) The value of an instrument constituting an evidence of debt, such as a check, draft, or promissory note, shall be deemed the amount due or collectible thereon or thereby, such figure ordinarily being the face amount of the indebtedness less any portion thereof which has been satisfied.

(ii) The value of any other instrument which creates, releases, discharges, or otherwise affects any valuable legal right, privilege, or obligation shall be deemed the amount of economic loss which the owner of the instrument might reasonably suffer by virtue of the loss of the instrument.

(b) When it cannot be determined if the value of the property is more or less than \$150 by the standards set forth in subsection (63)(a) above, its value shall be deemed to be an amount less than \$150.

(c) Amounts involved in thefts committed pursuant to a common scheme or the same transaction, whether from the same person or several persons, may be aggregated in determining the value of the property.

(64) "Vehicle" means any device for transportation by land, water, or air or mobile equipment with provision for transport of an operator.



(65) "Weapon" means any instrument, article, or substance which, regardless of its primary function, is readily capable of being used to produce death or serious bodily injury.

(66) "Witness" means a person whose testimony is desired in any official proceeding, in any investigation by a grand jury, or in a criminal action, prosecution, or proceeding.

**History:** En. 94-2-101 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 1, Ch. 190, L. 1975; amd. Sec. 1, Ch. 405, L. 1975; amd. Sec. 1, Ch. 443, L. 1975; amd. Sec. 10, Ch. 359, L. 1977.

**Source:** (1) Identical to Illinois Criminal Code 1961, Chapter 38, section 2-2.

(2) Identical to Illinois Criminal Code 1961, Chapter 38, section 2-3.

(3) Identical to the Model Penal Code 1962, section 240.0(8).

(4) Identical to the Model Penal Code 1962, section 240.0(1).

(5) Substantially the same as the Model Penal Code 1962, section 210.0(2).

(6) New.

(7) New.

(8) Identical to Illinois Criminal Code 1961, Chapter 38, section 2-4.

(9) Identical to Illinois Criminal Code 1961, Chapter 38, section 2-5.

(10) Substantially the same as Illinois Criminal Code 1961, Chapter 38, section 2-14.

(11) Identical to Illinois Criminal Code 1961, Chapter 38, section 15-4.

(12) Identical to Minnesota Statutes Annotated, Title 40A, section 609.765.

(13) Model Penal Code 1962, section 223.0(1).

(14) New. This definition covers homosexuality and bestiality.

(15) New.

(16) New.

(17) Illinois Criminal Code 1961, Chapter 38, section 2-8.

(18) Identical to the Model Penal Code 1962, section 240.0(2).

(19) Identical to the Model Penal Code 1962, section 240.0(19).

(20) Deleted by Sec. 10, Ch. 359, Laws of 1977. See 1977 Amendment Note.

(21) Model Penal Code 1962, section 251.2.

(22) Model Penal Code 1962, section 210.0(1).

(23) New.

(24) New.

(25) Revised Codes of Montana 1947, section 94-35-107.

(26) Substantially the same as the Model Penal Code 1962, section 2.01.

(27) Substantially the same as the New York Penal Law 1965, section 10.00(16).

(28) Substantially the same as the Model Penal Code 1962, sections 1.13(13), 2.02.

(29) Identical to the New York Penal Law 1965, section 130.00(5). Revised Codes of Montana 1947, section 94-4101(2) specified that the degree of mental deficiency be such as to render the victim "incapable of giving legal consent." Formulation in terms of capacity to give legal consent is circular and was rejected as failing to provide a meaningful guide. This definition limits criminality to mental disease or defect so serious as to render the victim "incapable of appreciating the nature of his conduct." A condition such as nymphomania which affects only the woman's capacity to "control herself sexually" where there is no physical or mental disability will not destroy consent, otherwise valid.

(30) Substantially the same as the New York Penal Law 1965, section 130.00(6). The victim need not be unconscious to be mentally incapacitated.

(31) New.

(32) New York Penal Law 1965, section 15.05(4); Model Penal Code 1962, sections 1.13(15), 2.02(2d).

(33) Identical to the Model Penal Code 1962, section 223.0(5); Illinois Criminal Code 1961, Chapter 38, section 15-7.

(34) Substantially the same as Illinois Criminal Code 1961, Chapter 38, section 15-8.

(35) Model Penal Code 1962, section 220.1(4).

(36) New.

(37) Model Penal Code 1962, section 1.04(1).

(38) Model Penal Code 1962, section 2.42.6(1).

(39) Identical to the Model Penal Code 1962, section 240.0(4).

(40) Substantially the same as Illinois Criminal Code 1961, Chapter 38, section 2-21.

(41) Identical to Illinois Criminal Code 1961, Chapter 38, section 15-2.

(42) Identical to the Model Penal Code 1962, section 240.0(5).

(43) Substantially the same as Illinois Criminal Code 1961, Chapter 38, section 2-13.

(44) Identical to the Model Penal Code 1962, section 240.0(6).

(45) Substantially the same as Illinois Criminal Code 1961, Chapter 38, section 2-15.

(46) Substantially the same as the New York Penal Law 1965, section 130.00(7).

(47) Substantially the same as the Model Penal Code 1962, section 2.01(4).

(48) Substantially the same as the New York Penal Law 1965, section 140.0(1).

(49) Substantially the same as Illinois Criminal Code 1961, Chapter 38, section 15-1.

(50) Model Penal Code 1962, section 223.0(7).

(51) Model Penal Code 1962, section 251.2(1).

(52) Substantially the same as the Model Penal Code 1962, section 240.0(7); New York Penal Law 1965, section 10.00(15).

(53) Substantially the same as the Model Penal Code 1962, section 2.02(2a), (6).

(54) Substantially the same as the Model Penal Code 1962, section 210.0(3).

(55) Identical to the New York Penal Law 1965, section 130.00(3).

(56) New York Penal Law 1965, section 130.00(1), (2), (3). This definition includes abnormal intercourse, either homosexual or heterosexual by mouth or anus, as well as normal genital copulation. The definition is broader than former law, although "the infamous crime against nature" of Revised Codes of Montana 1947, section 94-4118 probably covers most abnormal sexual acts. The definition also adheres to the "slight penetration" rule of Revised Codes of Montana 1947, section 94-4103.

(57) Identical to Illinois Criminal Code 1961, Chapter 38, section 2-20.

(58) Substantially the same as Illinois Criminal Code 1961, Chapter 38, section 2-21.

(59) New.

(60) Identical to Illinois Criminal Code 1961, Chapter 38, section 15-6.

(61) New.

(62) New.

(63) Substantially the same as Illinois Criminal Code 1961, Chapter 38, section 15-5.

(64) Michigan Property Crimes Code 1967, section 3201.

(65) New.

(66) New York Penal Law 1965, section 10.00(13).

(67) Revised Codes of Montana 1947, section 94-9001.

(68) Deleted by Sec. 1, Ch. 405, Laws of 1975. See sec. 94-5-501(2).

#### Amendments

Chapter 190, Laws of 1975, substituted "controlled substance as defined in chapter

3 of Title 54, R. C. M. 1947, and alcoholic beverage" in subdivision (25) for "substance having an hallucinogenic, depressant, stimulating, or narcotic effect, taken in such quantities as to impair mental or physical capability"; and made a minor change in punctuation.

Chapter 405, Laws of 1975, deleted former subdivision (68) which read: "Without consent" means: (a) the victim is compelled to submit by force or by threat of imminent death, bodily injury, or kidnapping, to be inflicted on anyone; or (b) the victim is incapable of consent because he is: (i) mentally defective or incapacitated; or (ii) physically helpless; or (iii) less than sixteen (16) years old". See sec. 94-5-501(2).

Chapter 443, Laws of 1975, inserted the second sentence in subdivision (28); and made a minor change in punctuation.

The 1977 amendment inserted "and unless a different meaning plainly is required, the following definitions apply in this title" before subdivision (1); inserted "is or" before "is not a matter of official record" in subdivision (11)(d); deleted subdivision (20) which read "He, she, it." The singular term shall include the plural and the masculine gender the feminine except where a particular context clearly requires a different meaning"; renumbered subdivisions (21) through (67) as (20) through (66), respectively; substituted "one or more persons" in present subdivision (20) for "one person"; inserted "or a secret" before "designed process" in subdivision (48)(j); inserted "official" before "proceeding" in subdivision (66); and made minor changes in style, phraseology and punctuation.

#### Convictions in Other Jurisdictions

A conviction under federal law cannot be the basis for disqualifying a voter unless such conviction would be classified as a felony under Montana law. *Melton v. Oleson*, — M —, 530 P 2d 466, overruling *State ex rel. Anderson v. Fousek*, 91 M 448, 8 P 2d 791.

#### "Occupied Structure"

Semitrailer attached to sleeper-cab tractor was an "occupied structure." *State v. Shannon*, — M —, 554 P 2d 743.

#### "Serious Bodily Injury"

Whether an injury involves a substantial risk of death, is a question of fact to be determined by the jury. *State v. Fuger*, — M —, 554 P 2d 1338.

#### DECISIONS UNDER FORMER LAW

##### Subdivision (15)—Federal Law

Under federal law, the maximum poten-

tial punishment determines whether an offense constitutes a felony or misde-



meanor as contra-distinguished from the prevailing Montana rule under which crimes are classified as felonies or misdemeanors by the punishment actually imposed. State ex rel. Anderson v. Fousek, 91 M 448, 8 P 2d 791, 84 ALR 303, overruled on other grounds in — M —, 530 P 2d 466.

#### —Felony or Misdemeanor

The potential maximum sentence determined the grade of the crime until sentence was imposed where the offense was neither divisible into degrees nor inclusive of lesser offenses and punishment was in the discretion of the court or jury; if the sentence imposed was other than imprisonment in the state prison, the offense was considered a misdemeanor under former section 94-114. State v. Atlas, 75 M 547, 244 P 477.

#### Subdivision (25)—Vodka

While former section 94-35-107 did not use the word vodka, any beverage containing more than one-half of one per cent of alcohol was an intoxicating liquor and court could take judicial notice of commonly accepted and generally understood definition of word "vodka" under section 93-601-1. State v. Wild, 130 M 476, 305 P 2d 325, 334.

#### Subdivision (28)—Fraudulent Intent

Under former section 94-118 proof of intent to defraud could consist of reasonable inferences drawn from affirmatively established facts; defendant who was sufficiently conscious to recognize fraudulent nature of check was of adequate mental ability to form an intent to defraud by issuing the check, knowing of its fraudulent nature. State v. Cooper, 146 M 336, 406 P 2d 691.

#### —General Intent

Effect of former section 94-105 was to make any required "intent to defraud" a general, rather than a specific, intent. State v. Cooper, 146 M 336, 406 P 2d 691.

#### —Instructions to Jury

Under former section 94-117 an instruction charging the jury that when an unlawful act is shown to have been deliberately committed for the purpose of injuring another it is presumed to have been committed with a malicious and guilty intent, in that the law presumes that a person intends the ordinary consequences of any voluntary act committed by him, may mislead the jury, and should not be given in a prosecution for assault in the first-degree, the very gist of which is the intent with which it was committed. State v. Schaefer, 35 M 217, 88 P 792, distinguished in 135 M 139, 147, 337 P 2d 924.

#### —Manifestation of Intent

Evidence that defendant accosted a nine-year-old girl on the street and asked her to come to his room and play with him, on arriving there locked the door, asked her to remove her dress and then placed his hand upon her shoulder in an attempt to remove her dress, was sufficient to warrant a finding by the jury that the defendant intended to arouse his sexual desires in a depraved manner. State v. Koehler, 112 M 511, 119 P 2d 35.

#### —Presumption of Intent

Intent is conclusively presumed from the occurrence of a statutory offense such as collection of unlawful fees from a county. State ex rel. Rowe v. District Court, 44 M 318, 119 P 1103.

#### —Specific Intent

Under former section 94-118, finding of jury that defendant was able to form specific intent to commit first-degree assault as required by statute was supported by evidence that, although intoxicated, defendant turned off lights inside apartment, reached into a nearby drawer and prepared revolver for action, surrendered to police, walked out of apartment under own power with hands in air and after arrest had no difficulty recounting recent events to police. State v. Lukas, 149 M 45, 423 P 2d 49.

#### Subdivision (29)—Burden of Proof

Under former section 94-119, the burden of proving insanity pleaded by a defendant charged with a crime was upon the defendant; an instruction that the state was required to prove beyond a reasonable doubt that defendant was sane at the time of the commission of the offense was error. State v. Vetter, 76 M 574, 248 P 179; State v. DeHaan, 88 M 407, 292 P 1109.

#### —Definition of Insanity

Under former section 94-119, insanity constituted any defect, weakness or disease of the mind which rendered it incapable of entertaining, in the particular instance, the criminal intent which was an ingredient of all crimes. State v. Narich, 92 M 17, 9 P 2d 477.

#### —Evidence of Insanity

Evidence that defendant's reason had been clouded by intoxication during the earlier hours of the day on which the homicide was committed, and that he suffered from periodic heart attacks, did not warrant an instruction upon the question of his sanity. State v. Kuum, 55 M 436, 178 P 288.

Despite expert testimony that the defendant was suffering from epilepsy, ren-



dering him incapable of knowing of or remembering his actions during the incident giving rise to prosecution for second degree assault, evidence that defendant, after striking his victim with a gun, warned her not to say anything about it, concealed himself thereafter, and one month later detailed the entire event to a medical expert, was sufficient to support guilty verdict. *State v. DeHaan*, 88 M 407, 292 P 1109.

Under former section 94-201, defendant was entitled to plead insanity as bar to conviction for first degree murder, but failed to sustain burden of proof by preponderance of evidence, as required by statute, in view of evidence that his activities on the day of shooting were normal, that he was quite calm after shooting occurred and that he knew right from wrong at the time of the shooting, according to a psychiatrist. *State v. Sanders*, 149 M 166, 424 P 2d 127.

#### —Instructions to Jury

Trial courts in instructing juries on defense of insanity should make their instructions as plain and simple as possible, incorporate therein the appropriate code sections, supplementing the definition of insanity as indicated in the case of *State v. Peel*, 23 M 358, 59 P 169, and avoid numerous instructions which may be confusing and serve no useful purpose. *State v. Narich*, 92 M 17, 9 P 2d 477.

#### —Opinion of Lay Witness

Under former section 94-119, lay witnesses' opinion testimony as to defendant's sanity prior to the event giving rise to defendant's prosecution for homicide was admissible where lay witnesses were intimately acquainted with the defendant as in many instances such testimony is more helpful in arriving at conclusion as to defendant's sanity than expert opinion testimony based on hypothetical questions. *State v. Simpson*, 109 M 198, 95 P 2d 761, overruled on other grounds in *State v. Knox*, 119 M 449, 453, 175 P 2d 774.

#### Subdivision (30)—Insanity

Evidence that defendant's reason had been clouded by intoxication during the earlier hours of the day on which the homicide was committed, and that he suffered from periodic heart attacks, did not warrant an instruction upon the question of his sanity. *State v. Kuum*, 55 M 436, 178 P 288.

#### Subdivision (31)—Federal Law

Under federal law, the maximum potential punishment determines whether an offense constitutes a felony or misdemeanor as contra-distinguished from the

prevailing Montana rule under which crimes are classified as felonies or misdemeanors by the punishment actually imposed. *State ex rel. Anderson v. Fousek*, 91 M 448, 8 P 2d 791, 8 ALR 303, overruled on other grounds in — M —, 530 P 2d 466.

#### —Felony or Misdemeanor

The potential maximum sentence determined the grade of the crime until sentence was imposed where the offense was neither divisible into degrees nor inclusive of lesser offenses and punishment was within the discretion of the court or jury; if the sentence imposed was other than imprisonment in the state prison, the offense was considered a misdemeanor under former section 94-114. *State v. Atlas*, 75 M 547, 244 P 477.

#### Subdivision (32)—Criminal Negligence

In prosecution for involuntary manslaughter under former section 94-2507, criminality of the act resulting in death was established if the act was done negligently in such a manner as to evince a disregard for human life or an indifference to consequences irrespective of whether unlawful act was *malum in se* or merely *malum prohibitum*. *State v. Strobel*, 130 M 442, 304 P 2d 606, overruled on other grounds, 134 M 519, 525, 333 P 2d 1017.

#### —Evidence of Negligence

Whether defendant, while intoxicated and in the act of exhibiting his revolver to the deceased, also under the influence of liquor, exercised that usual and ordinary caution in handling the weapon made necessary by former section 94-2511 to render the killing excusable, was one for determination by the jury. *State v. Kuum*, 55 M 436, 178 P 288, distinguished in 85 M 544, 546, 281 P 352.

Evidence in a prosecution for involuntary manslaughter arising out of an automobile accident in city at nighttime, showing defendant driving at 15 miles per hour, that he did not see deceased, that he had not been drinking, that he was looking straight ahead but saw nothing to indicate the presence of the pedestrian, etc., was insufficient to warrant a verdict of guilty of such reckless disregard of human life as was required to constitute the offense under former section 94-2507, subdivision 2 and the information should have been dismissed. *State v. Powell*, 114 M 571, 576, 138 P 2d 949, distinguished in 134 M 519, 522, 333 P 2d 1017.

Evidence was sufficient to warrant jury finding under former section 94-2511 that "usual and ordinary caution" was not exercised where doctor testified that basal skull fracture and fatal transection of liver were caused by an extensive and

severe force. *State v. Henrich*, 159 M 365, 498 P 2d 124.

#### **Subdivision (37)—Contempt of Court**

A contempt of court, punishable by fine or imprisonment, or both, was a public offense under former section 94-112. *State ex rel. Flynn v. District Court*, 24 M 33, 35, 60 P 493.

#### **—Ordinance Violation**

The threatened violation of a town ordinance was not a "public offense" within the meaning of former section 94-112. *State ex rel. Streit v. Justice Court*, 45 M 375, 380, 123 P 405.

A valid city ordinance, passed by the municipality with the design of the legislature was a "law" as that term was used in former section 94-112, which defined a public offense as an act committed or omitted in violation of a law, and such ordinance had, within the territorial jurisdiction of the municipality, the same force and was to be treated as a legislative act. *State ex rel. Marquette v. Police Court*, 86 M 297, 309, 283 P 430.

An action by a city instituted in its police court by the filing of a complaint charging a violation of one of its ordinances, and seeking the imposition of a fine, was criminal in nature; the court acquired jurisdiction over defendant by the issuance and service of a warrant of arrest. *State ex rel. Marquette v. Police Court*, 86 M 297, 283 P 430, modifying *City of Bozeman v. Nelson*, 73 M 147, 237 P 528.

#### **—Removal from Office**

A proceeding for the summary removal of a county attorney for misconduct, even though instituted by a private person, was a public proceeding, and, though it was summary in its nature, was classified as a prosecution for a crime under former section 94-112. *State ex rel. McGrade v. District Court*, 52 M 371, 157 P 1157.

An officer (county clerk) charged with willful neglect of duty was not entitled to jury trial in proceeding for his removal from office under former section 94-112. *State ex rel. Bullock v. District Court*, 62 M 600, 602, 205 P 955.

#### **Subdivision (49)—Promissory Notes**

Under former section 94-2710, an instruction in a prosecution for the larceny of promissory notes that the amount of money due on the notes or secured to be paid thereby and remaining unsatisfied was their value, was correct; instruction offered by defendant to the effect that evidence relating to the instrument should be disregarded because it had not been shown that they had any value, was properly refused where one of the notes was introduced in evidence and the value of

the other was shown by books of account, thus making out a prima facie case for the state. *State v. Cassill*, 71 M 274, 279, 229 P 716.

#### **Subdivision (53)—Fraudulent Intent**

Under former section 94-118 proof of intent to defraud could consist of reasonable inferences drawn from affirmatively established facts; defendant who was sufficiently conscious to recognize fraudulent nature of check was of adequate mental ability to form an intent to defraud by issuing the check, knowing of its fraudulent nature. *State v. Cooper*, 146 M 336, 406 P 2d 691.

#### **—General Intent**

Effect of former section 94-105 was to make any required "intent to defraud" a general, rather than a specific intent. *State v. Cooper*, 146 M 336, 406 P 2d 691.

#### **—Instructions to Jury**

Under former section 94-117 an instruction charging the jury that when an unlawful act is shown to have been deliberately committed for the purpose of injuring another it is presumed to have been committed with a malicious and guilty intent, in that the law presumes that a person intends the ordinary consequences of any voluntary act committed by him, may mislead the jury, and should not be given in a prosecution for assault in the first-degree, the very gist of which offense is the intent with which it was committed. *State v. Schaefer*, 35 M 217, 88 P 792, distinguished in 135 M 139, 147, 337 P 2d 924.

#### **—Manifestation of Intent**

Evidence that defendant accosted a nine-year-old girl to whom he was a total stranger on the street, invited her to come to his room and play with him, on arriving there locked the door, asked her to remove her dress and then placed his hand upon her shoulder in an attempt to remove her dress, was sufficient to warrant a finding by the jury that the defendant intended to arouse his sexual desires in a depraved manner. *State v. Koehler*, 112 M 511, 119 P 2d 35.

#### **—Presumption of Intent**

Intent is conclusively presumed from the occurrence of a statutory offense such as collecting unlawful fees from a county. *State ex rel. Rowe v. District Court*, 44 M 318, 119 P 1103.

#### **—State as Victim**

By virtue of former section 94-105, which included bodies politic among those entities which one could criminally intend to defraud, the crimes of grand larceny and obtaining money by false pretenses,



as defined by former sections 94-2701 and 94-1805 respectively, could be committed against the state, since the gravamen of

each offense was to defraud the true owner of his, or its, property. *State v. Cline*, — M —, 555 P 2d 724.

**94-2-102. Voluntary act.** A material element of every offense is a voluntary act, which includes an omission to perform a duty which the law imposes on the offender and which he is physically capable of performing. Possession is a voluntary act if the offender knowingly procured or received the thing possessed, or was aware of his control thereof for a sufficient time to have been able to terminate his control.

**History:** En. 94-2-102 by Sec. 1, Ch. 513, L. 1973.

**Source:** Identical to Illinois Criminal Code, Chapter 38, sections 4-1 and 4-2.

#### Commission Comment

The minimum elements of any offense (other than one in which absolute liability for an act alone is imposed) are described as a voluntary act and a specified state of mind. See R. C. M. 1947, section 94-117.

The word "act" is sometimes used loosely to describe not only the person's physical movement, but also certain attendant circumstances and the consequence of the movement. However, in the interest of accurate expression these three components should be separately designated, and "act" should be limited to the relevant physical movements. A further narrowing of the use of the term in a criminal code arises from the fact that a muscular movement may be voluntary ("willed") or involuntary—a physical reflex or compelled motion which is not accompanied by the volition of the person making the motion. Only the voluntary act gives rise to criminal liability. In this code, "act" is used in the narrow sense and with the accompanying mental state, is referred to as "conduct." An "omission" to take some action required by law is distinguished sometimes from an "act," since it denotes lack of physical movement. However, an omission necessarily is defined by describing the act of commission which is omitted; and if the distinction is made, then the phrase "act or omission" must be used each time reference is made to a person's physical behavior, unless the reference is only to a positive movement, or only to the lack of required movement. Consequently, the use of "act" to include

"omission" seems reasonable, and clearly is more convenient. Perkins, "Negative Acts in Criminal Law," 22 Iowa L. Rev. 95 at 107 (1934). This usage, of course, does not preclude the specific reference to an omission when the failure to perform a duty imposed by law is the substance of a particular offense. The criminal law is concerned only with the voluntary phase—the purposeful or negligent omission to perform a duty which the person is capable of performing.

Possession is another aspect of behavior which, while it does not necessarily involve a physical movement is conveniently brought within the definition of "act" when it refers to maintaining control of a physical object. Again, only the voluntary aspect is significant—a consciousness of purpose, derived from knowingly procuring or receiving the thing possessed, or awareness of control thereof for a sufficient time to enable the person to terminate his control. An examination of the former Montana statutory provisions prohibiting possession indicates the suitability of this usage. Some of the provisions in the present law flatly prohibit possession of specified objects, without reference to any accompanying mental state. (E.g., section 94-8-211, concealed firearm; section 54-133, narcotics; section 94-8-404, gambling device; section 94-8-202, machine gun.) Others denounce possession with intention to accomplish a specified purpose, such as sale or the commission of another offense. (E.g., section 94-6-205, possession of burglary tools; section 94-8-110, obscenity.) A few analogous situations involve the ownership or possession of real property used for prohibited purposes.

**94-2-103. General requirements of criminal act and mental state.** (1) A person is not guilty of an offense, other than an offense which involves absolute liability, unless, with respect to each element described by the statute defining the offense, he acts while having one of the mental states described in subsections (27), (31), and (52) of 94-2-101.

(2) If the statute defining an offense prescribes a particular mental state with respect to the offense as a whole, without distinguishing among



the elements thereof, the prescribed mental state applies to each such element.

(3) Knowledge that certain conduct constitutes an offense or knowledge of the existence, meaning, or application of the statute defining an offense is not an element of the offense unless the statute clearly defines it as such.

(4) A person's reasonable belief that his conduct does not constitute an offense is a defense if:

(a) the offense is defined by an administrative regulation or order which is not known to him and has not been published or otherwise made reasonably available to him and he could not have acquired such knowledge by the exercise of due diligence pursuant to facts known to him;

(b) he acts in reliance upon a statute which later is determined to be invalid;

(c) he acts in reliance upon an order or opinion of the Montana supreme court or a United States appellate court later overruled or reversed; or

(d) he acts in reliance upon an official interpretation of the statute, regulation, or order defining the offense made by a public officer or agency legally authorized to interpret such statute.

(5) If a person's reasonable belief is a defense under subsection (4), nevertheless he may be convicted of an included offense of which he would be guilty if the law were as he believed it to be.

(6) Any defense based upon this section is an affirmative defense.

**History:** En. 94-2-103 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 11, Ch. 359, L. 1977.

**Source:** Substantially the same as Illinois Criminal Code, Chapter 38, sections 4-3 and 4-8; also derived from Model Penal Code, section 2.04.

#### Commission Comment

The accurate description of the mental states which are elements of the various specific offenses is one of the most difficult problems in the preparation of a criminal code.

In a number of other states, efforts have been made to simplify the description of mental states, by defining a small number of terms and using them uniformly throughout the criminal code, with appropriate qualifying language where necessary to describe accurately a particular offense. Subsection (2) provides a general rule for interpretation of statutory references to mental state in defining specific offenses. Often, a single mental state word, such as "knowingly" is placed in a position where grammatically it may apply to all elements of the offense. To so apply it for the purpose of legal interpretation seems logical, since the purpose that it shall not apply to certain elements of the offense may be expressed readily by a different sentence structure. Subsection (3) states the accepted rule that in the

absence of a statutory requirement, knowledge of the law is not an element of the offense. A person's liability for an offense does not depend upon his knowing that his conduct constitutes an offense, or knowing of the existence, meaning, or application of the defining statute. A reasonable reliance upon a statute later determined to be invalid, or upon an authoritative statutory interpretation, later determined to be invalid or erroneous is a defense. Clearly, the state should not punish as criminal, conduct which, according to a formally expressed statement of its duly authorized agents, is not illegal. Proof of the facts upon which such a defense is based should not be difficult, nor should determination of the reasonableness of the defendant's reliance; and since the enactment or interpretation relied upon would be of a public and official nature, collusion to avoid criminal liability seems unlikely. When ignorance or mistake is recognized as a defense the defendant may be convicted of an included offense which does not involve the mental state negated by the ignorance or mistake.

#### Amendments

The 1977 amendment changed the references to subsections of 94-2-101 in subsection (1); and made minor changes in phraseology, punctuation and style.

## DECISIONS UNDER FORMER LAW

**Criminal Negligence**

In prosecution for involuntary manslaughter under former section 94-2507, criminality of the act resulting in death was established if the act was done negligently in such a manner as to evince a disregard for human life or an indifference to consequences irrespective of whether unlawful act was malum in se or merely malum prohibitum. *State v. Strobel*, 130 M 442, 304 P 2d 606, overruled on other grounds, 134 M 519, 525, 333 P 2d 1017.

**Evidence of Intent**

Under former section 94-118, finding of jury that defendant was able to form specific intent to commit first-degree assault as required by statute was properly inferred from evidence that, although intoxicated, defendant turned off lights inside apartment, reached into a nearby drawer and prepared revolver for action, surrendered to police, walked out of apartment under own power with hands in air and after arrest had no difficulty recounting recent events to police. *State v. Lukus*, 149 M 45, 423 P 2d 49.

**Fraudulent Intent**

Under former section 94-118, proof of intent to defraud could consist of reasonable inferences drawn from affirmatively established facts; where defendant was sufficiently conscious at the time of the utterance of check to recognize its fraudulent nature he was of adequate mental ability to form an intent to defraud. *State v. Cooper*, 146 M 336, 406 P 2d 691.

**Insanity Affecting Intent**

Under former section 94-117 insanity was defined as any weakness or defect of the mind rendering it incapable of entertaining in the particular instance the criminal intent; criminal responsibility was to be determined solely by defendant's capacity to conceive and entertain the intent to commit the particular crime. *State v. Keerl*, 29 M 508, 75 P 362.

**Instructions to Jury**

An instruction embodying the provisions of former sections 94-117 and 94-118 regarding the necessity of the presence of joint operation of act and intent to constitute a crime, should have been given in every criminal prosecution, especially when requested by defendant. *State v. Allen*, 34 M 403, 87 P 117.

Under former section 94-117, an instruction charging jury that when an unlawful act is shown to have been deliberately

committed for the purpose of injuring another it is presumed to have been committed with a malicious and guilty intent, and that the law presumes that a person intends the ordinary consequences of any voluntary act committed by him, may mislead the jury, and should not have been given in prosecution for assault in the first degree, a critical element of which is the intent with which the act is committed. *State v. Schaefer*, 35 M 217, 88 P 792.

Under former section 94-117, refusal to instruct that in every crime there must exist union or joint operation of act and intent or criminal negligence as provided by statute was not error in prosecution for second degree assault under which general nonstatutory intent to do harm willfully, wrongfully and unlawfully is an element, but under which specific statutory intent to do any particular kind of degree of injury to victim is not an element. *State v. Fitzpatrick*, 149 M 400, 427 P 2d 300.

Since under former section 94-117, specific intent was not a necessary element of second degree assault, refusal of instruction thereon was proper even though defendant claimed that high degree of intoxication precluded formation of intent. *State v. Warrick*, 152 M 94, 446 P 2d 916.

**Involuntary Manslaughter**

Willful or evil intent was not an element of involuntary manslaughter under former section 94-117. *State v. Pankow*, 134 M 519, 333 P 2d 1017.

**Manifestation of Intent**

Evidence that defendant accosted a nine-year-old girl to whom he was a total stranger on the street, invited her to his room to play with him, on arriving there locked the door, asked her to remove her dress and then placed his hand upon her shoulder in an attempt to remove her dress, was sufficient to warrant a jury finding that the defendant intended to arouse his sexual desires in a depraved manner. *State v. Kocher*, 112 M 511, 119 P 2d 35.

**Presumption of Intent**

Under former section 94-117, intent was conclusively presumed from the commission of a statutory offense, as for collecting illegal fees, and where the statutes were not ambiguous, it was no defense that defendant acted on the advice of the attorney general. *State ex rel. Rowe v. District Court*, 44 M 318, 119 P 1103.



**94-2-104. Absolute liability.** A person may be guilty of an offense without having, as to each element thereof, one of the mental states described in subsections (27), (31), and (52) of 94-2-101 only if the offense is punishable by a fine not exceeding \$500 and the statute defining the offense clearly indicates a legislative purpose to impose absolute liability for the conduct described.

**History:** En. 94-2-104 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 12, Ch. 359, L. 1977.

**Source:** Substantially the same as Illinois Criminal Code, Chapter 38, section 4-9.

#### Commission Comment

This section is intended to establish strict limitations upon the elimination of a mental state as an element of an offense. Most states have numerous statutes which impose upon the courts the responsibility of determining, as to each such provision, either that mental state is or is not an element, or (particularly in the more serious offenses) that the legislature intended that a particular mental state be implied. (See the careful study of the Wisconsin statutes by Remington, "Liability Without Fault Criminal Statutes," 1956 Wis. L. Rev. 625.) Many such provisions are found in legislation of a regulatory nature, involving the sale of specified kinds of property to designated classes of persons or to the public, the commission of nuisances, the violation of laws concerning motor vehicles, health and safety, and fish and game laws.

In the old code numerous statutes failed to specify the mental state required and no adequate rule existed for determining whether a particular provision, not interpreted by the court was to be regarded as implying a particular mental state or as imposing absolute liability. (The usual methods of interpretation are summarized in Remington, "Liability Without Fault Criminal Statutes," 1956 Wis. L. Rev. 625 at 629 to 632.)

Section 94-2-104 represents only a partial solution of the problem—a restrictive rule of interpretation. Another part of the solution is in the rephrasing of code provisions which define specific offenses,

to indicate clearly the intended mental state and the offenses in which mental state, for some cogent policy reason, is not an element.

Absolute liability is authorized for those offenses in which incarceration is not part of the penalty, and the fine is less than five hundred dollars (\$500.00). Many of the old Montana code provisions which do not require proof of specified mental state are in this category, as are many of the penal provisions appearing outside of the Criminal Code. The difficulty of enforcing such provisions if a mental state must be proved may justify the conclusion that the omission of a mental state requirement is intended to create absolute liability. (See Model Penal Code, Draft No. 4, comment on ¶ 2.05 at page 145; Sayre, "Public Welfare Offenses," 33 Colum. L. Rev. 55 at 68 to 72, 78 and 79 (1933)).

In addition to restricting absolute liability to offenses not punishable by incarceration or by a fine of more than five hundred dollars (\$500.00), this section provides that only a clearly indicated legislative purpose to create absolute liability should be recognized, and in all other instances, a mental state requirement should be implied as an application of the general rule that an offense consists of an act accompanied by a culpable mental state, as provided in section 94-2-103(1), (2) and (3). (See Model Penal Code, Draft No. 4, comment on ¶ 2.05 at pages 145 and 146; Sayre, *supra*, at pages 68 to 72 and 79 to 83).

#### Amendments

The 1977 amendment changed the references to subsections of 94-2-101 to conform with the amendment of that section; and made minor changes in punctuation and style.

**94-2-105. Causal relationship between conduct and result.** (1) Conduct is the cause of a result if:

- (a) without the conduct the result would not have occurred; and
- (b) any additional causal requirements imposed by the specific statute defining the offense are satisfied.

(2) If purposely or knowingly causing a result is an element of an offense, and the result is not within the contemplation or purpose of the offender, either element can nevertheless be established if:

- (a) the result differs from that contemplated only in the respect that



a different person or different property is affected, or that the injury or harm caused is less than contemplated; or

(b) the result involves the same kind of harm or injury as contemplated but the precise harm or injury was different or occurred in a different way, unless the actual result is too remote or accidental to have a bearing on the offender's liability or on the gravity of the offense.

(3) If negligently causing a particular result is an element of an offense, and the result is not within the risk of which the offender is aware, or should be aware, either element can nevertheless be established if:

(a) the actual result differs from the probable result only in the respect that a different person or different property is affected, or that the actual injury or harm is less; or

(b) the actual result involves the same kind of injury or harm as the probable result, unless the actual result is too remote or accidental to have a bearing on the offender's liability or on the gravity of the offense.

**History:** En. 94-2-105 by Sec. 1, Ch. 513, L. 1973.

**Source:** Substantially the same as Model Penal Code, section 2.03.

#### Commission Comment

This section is concerned with offenses that are so defined that causing a particular result is a material element of the offense. Subsection (1) (a) treats cause-in-fact as the causal relationship normally regarded as sufficient to create culpability. When concepts of "proximate cause" disassociate the offender's conduct and the result which was cause-in-fact, the reason for limiting culpability is the conclusion that the actor's culpability with reference to the result, i.e., his purpose, knowledge, or negligence, was such that it would be unjust to permit the result to influence his liability or the gravity of the offense. Problems of this kind should be faced as problems of the culpability required for conviction and not as problems of causation.

Subsection (1) (b) contemplates that the general rule of (1) (a) may be unacceptable when dealing with particular offenses. In this event additional causal requirements may be imposed explicitly. Subsections (2) and (3) are drafted on the theory that there is a need to system-

atize rules that have developed when there is a variance between the actual result and the result sought, contemplated or probable under the circumstances. These subsections assume that liability requires purpose, knowledge or negligence with respect to the result which is an element of the offense. Subsections (2) (b) and (3) (b) make no attempt to catalogue possibilities like intervening or concurrent causes, etc. They set out an ultimate criterion, whether the result was too accidental to have a bearing on the actor's liability or the gravity of the offense. Since the actor has sought a criminal result or has been negligent with respect to that result, he will be guilty of some offense even if he is not held for the actual result. There is an advantage to permit the jury to face the issue squarely with their own sense of justice, e.g., where the defendant shoots his wife and in the hospital she contracts a disease and dies. Her death may be thought to have been rendered substantially more probable by the defendant's conduct yet a jury could regard it as too remote to convict the defendant of murder. It should be noted that the maximum potential punishment for attempt is the same as for the underlying offense, thus placing greater emphasis on purpose than result. See section 94-4-103.

#### DECISIONS UNDER FORMER LAW

##### Instructions to Jury

An instruction charging the jury that when an unlawful act is shown to have been deliberately committed for the purpose of injuring another, it is presumed to have been committed with a malicious and guilty intent, and that the law presumes that a person intends the ordinary

consequences of any voluntary act committed by him, may mislead the jury, and should not be given in a prosecution for assault in the first degree, a critical element of which was intent with which the act was committed. *State v. Schaefer*, 35 M 217, 221, 88 P 792.

**94-2-106. Accountability for conduct of another.** A person is responsible for conduct which is an element of an offense, if the conduct is either that of the person himself, or that of another and he is legally accountable for such conduct as provided in section 94-2-107, or both.

**History:** En. 94-2-106 by Sec. 1, Ch. 513, L. 1973.

**Source:** Identical to Illinois Criminal Code, Chapter 38, section 5-1.

**Commission Comment**

This section states the general principle that criminal liability is based on conduct and that the conduct may be that of another person.

**94-2-107. When accountability exists.** A person is legally accountable for the conduct of another when:

(1) having a mental state described by the statute defining the offense, he causes another to perform the conduct, regardless of the legal capacity or mental state of the other person; or

(2) the statute defining the offense makes him so accountable; or

(3) either before or during the commission of an offense, and with the purpose to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense. However, a person is not so accountable if:

(a) he is a victim of the offense committed unless the statute defining the offense provides otherwise; or

(b) before the commission of the offense, he terminates his effort to promote or facilitate such commission and does one of the following: wholly deprives his prior efforts of effectiveness in such commission, or gives timely warning to the proper law enforcement authorities, or otherwise makes proper effort to prevent the commission of the offense.

**History:** En. 94-2-107 by Sec. 1, Ch. 513, L. 1973.

**Source:** Substantially the same as Illinois Criminal Code, Chapter 38, section 5-2.

**Commission Comment**

This section is a statement of principles of accessoryship although that term is not employed in the code. It provides a much fuller statement of applicable law in this important field and, in some respects, alters and modifies the old law.

The former statutory provisions R. C. M. 1947, sections 94-6423 and 94-6425 had as their primary purpose the elimination of the elaborate common-law distinctions between principals in the first degree, principals in the second degree, and the accessories before the fact. Section 94-2-107 accepts the approach of the existing law and endeavors to develop it in full and systematic fashion.

Subsection (2) makes clear a person may be held legally accountable in circumstances not otherwise included in section 94-2-107, where the particular statute so provides. In such case the particular provision prevails. An example of such a statute might be one imposing vicarious

criminal liability on a tavern owner for the act of an employee resulting in sale of liquor to a minor.

Subsection (3) is a comprehensive statement of liability based on counseling, aiding and abetting which includes those situations that, at common law, involve the liability of principals in the second degree and accessories before the fact. Liability under this subsection requires proof of a "purpose to promote or facilitate . . . commission of the substantive offense." Moreover, "conspiracy" between the actor and defendant is not of itself made the basis of accountability for the actor's conduct, although the acts of conspiring may in many cases satisfy the particular requirements of this subsection. (See, e.g., *Pinkerton v. United States*, 328 US 640, 90 L Ed 1489, 66 S Ct 1180 (1946), Commentary, A.L.I., Model Penal Code Tent, Draft No. 1, 1953, 20-26.)

Subsection (3)(a) states that the person who is a "victim" of the criminal act does not, unless the particular statute so states, share the guilt of the actor. This is true even though the person is a "willing" victim and counseled commission of the crime. Thus, the victim of a blackmail plot who pays over money, even though he "aids"



the commission of the crime, or the girl under age of consent in statutory rape, even though she solicited the criminal act, are not deemed guilty of the substantive offense. Subsection (3)(a) does not prevent the extension of criminal liability to the victim if the particular statute so provides. Thus, if it be decided that a bribe-taker should be treated as guilty of bribery, this can be provided in the bribery section. All that is done in these provisions is to state the rule that persons falling under subsection (3)(a) are not guilty if there is no specific provision to the contrary.

Subsection (3)(b) poses the question: What can a person do who has aided and abetted in a criminal plot, to relieve himself of liability for the substantive crime? It appears desirable to provide some escape route, if for no other reason than to provide an inducement for disclosure of crimes before they occur. The problem here should be distinguished from the question in the law of conspiracy as to what actions are required for a person to disassociate himself from a conspiratorial agreement.

To obtain release from criminal liability the person must terminate his affirmative efforts to facilitate commission of the crime. In addition, he may be relieved if

he is able wholly to deprive his contributions to the commission of an offense of their effectiveness. If a timely warning is given the police, the person should be relieved even if through negligence or act of God the police fail to prevent the crime. Finally, a general clause "otherwise makes proper effort to prevent the commission of the offense" is included. This will require interpretation according to the facts of the individual case.

This section should not conflict with the substance of Montana case law that the knowledge that a crime is about to be committed does not make the accused an accomplice (*State v. Mercer*, 114 M 142, 152, 133 P 2d 358) and that one who knows a felony has been committed, but does nothing to conceal it or harbor or protect the offender, is not an accessory to the commission of that felony (*State v. McComas*, 85 M 428, 433, 278 P 993).

#### Nonaccountability

Where defendant was present when his companion fatally beat another and defendant did little to restrain his companion, this alone was not sufficient to make the defendant criminally accountable for his companion's actions. *State ex rel. Murphy v. McKinnon*, — M —, 556 P 2d 906.

### DECISIONS UNDER FORMER LAW

#### Constitutionality

Former section 94-6423 which abrogated the distinction between an accessory before the fact and the principal did not violate constitutional provision guaranteeing to an accused the right to demand the nature and cause of the accusation. *State v. Geddes*, 22 M 68, 87, 55 P 919.

#### Aiding and Abetting

One of a band of Indians hunting together who was present and saw another member of the band shoot a shepherd to prevent his reporting the killing of a cow by the Indians was an accomplice to the crime, so that his statement implicating defendant was insufficient unless corroborated. *State v. Spotted Hawk*, 22 M 33, 55 P 1026.

The object of the former section 94-6423 was to put the principal and the agent upon the same legal ground, and to authorize the principal to be charged as if he himself had committed the felony which was in fact perpetrated by his agent upon advice and encouragement of the principal. *State v. Geddes*, 22 M 68, 88, 55 P 919.

Under former section 94-6423, the distinction between accessories before the fact and principals was abrogated and all were treated as principals. *State v. De*

*Wolfe*, 29 M 415, 423, 74 P 1084, overruled on other grounds in *State v. Penna*, 35 M 535, 546, 90 P 787.

Where defendants charged with assault in the first degree showed by their own testimony that they went to the home of the victim to ascertain whether he had made a certain derogatory statement, one of them struck him for denying having made the statement and the other assaulted him for making the statement, each defendant was an accessory to the other and a principal in the carrying out of a common design. *State v. Maggett*, 64 M 331, 337, 209 P 989.

Defendants who, during the owner's absence, were in charge of a place where liquor was unlawfully sold could be found guilty as principals of maintaining a common nuisance. *State v. Peters*, 72 M 12, 231 P 392.

Defendant who referred and accompanied thieves to another who bought stolen cattle could be found guilty as a principal of receiving stolen property. *State v. Huffman*, 89 M 194, 296 P 789.

Where a verbal declaration of one co-defendant that he and the other co-defendant were partners was given in evidence, it was error for the court to refuse defendant's instruction that such verbal declara-



tion was insufficient to establish a partnership. Although existence of partnership was immaterial due to former sections 94-6423 and 94-204, the jury may have given full consideration to the declaration and found defendant guilty on the strength thereof. *State v. Keller*, 126 M 142, 246 P 2d 817, 821.

Under former sections 94-6423 and 94-204, evidence was sufficient to sustain a conviction of assault in the second degree where defendant was at the scene of the crime and was admittedly a participant therein; it is not necessary to show that he actually fired any one of the guns. *State v. Simon*, 126 M 218, 247 P 2d 481, 485.

Under former section 94-6423, a showing that the defendant aided or abetted in the taking of property from the person of another was sufficient to establish defendant's guilt of larceny. *State v. Maciel*, 130 M 569, 305 P 2d 335, 336.

Bartender who served drinks after hours and called prostitutes when customers arrived was in *pari delicto* and could not recover from his employer for injuries received in the course of that employment. *Lencioni v. Long*, 139 M 135, 361 P 2d 455.

Prison inmate who received custody of a guard from another inmate, then confined the guard against his will, could be found guilty of kidnaping as a principal even though the guard was originally seized by another and there was insufficient evidence of a preconceived plan of action. *State v. Frodsham*, 139 M 222, 362 P 2d 413.

Although circumstantial evidence was not sufficient to place defendant on the actual premises where the burglary occurred, it was sufficient to prove that defendant aided and abetted in the commission of the crime. In *re McMaster*, — M —, 529 P 2d 1391.

### Entrapment

Where a stock detective solicited one to assist him in the larceny of cattle for the purpose of convicting another of the crime, and the person so solicited on arrival at the scene of the intended taking declined to participate, he was not a principal to the crime, and hence, the one upon whom the crime was sought to be fastened, could not, under former section 94-6423, have become his accessory. *State v. Neely*, 90 M 199, 211, 300 P 561, distinguished in 138 M 123, 126, 354 P 2d 1105.

### Husband and Wife

Acquiescence by wife and her failure to protest when her husband unlawfully sold whiskey in her presence in their home were not enough to make her guilty as a principal under former section 94-204. *State v. Cornish*, 73 M 205, 235 P 702.

### Instructions to Jury

In a prosecution for arson, where there was some testimony that defendant procured another to set the fire, instructions embodying the provisions of former sections 94-6423 and 94-204, were proper; court properly refused instructions directing the jury to find for the defendant unless satisfied beyond a reasonable doubt that he was present personally and set the fire himself. *State v. Chevigny*, 48 M 382, 385, 138 P 257.

Instructions substantially in the words of former sections 94-6423 and 94-204, defining a principal and telling the jury that the distinction between a principal and an accessory had been abrogated by statute, were not improper as implying that a felony had been committed. *State v. Wiley*, 53 M 383, 387, 164 P 84.

An instruction defining "principals" as all persons who "aid or abet" in the commission of an offense, instead of "aid and abet" as used in former section 94-204, was incorrect. *State v. McClain*, 76 M 351, 246 P 956.

Where the state proceeded on the theory that defendant was present and directly committed the crime of horse stealing, not on the theory that he was not present but aided and abetted another, an instruction in the language of former section 94-204, defining principals to include those not present but aiding and abetting another, was not reversible error, though not proper on retrial. *State v. Hamilton*, 87 M 353, 363, 287 P 933.

The use of the disjunctive "or" in an instruction in a criminal case defining who are principals, saying that one who aids "or" abets another in the commission of an offense is a principal, instead of aids "and" abets, the conjunctive used in former section 94-204, was error. *State v. Ludwick*, 90 M 41, 300 P 558.

### Knowledge

Mere presence at the commission of a crime does not render one an accomplice unless under the circumstances he had a duty to interfere. *State v. McComas*, 85 M 428, 278 P 993.

Under former section 94-6423, the mere knowledge in a person that a crime was about to be committed did not constitute him an accomplice; nor did the fact that one charged with receiving stolen property, on prior occasions may have purchased such property seem sufficient to make the receiver an accomplice in the particular theft nor even to give him the knowledge that it was to be committed. *State v. Mercer*, 114 M 142, 149, 133 P 2d 358.

**Receiver of Stolen Property**

Defendant who became an accomplice to the theft of a calf by encouraging and advising the thief became a principal to the crime under former section 94-6423 and was a constructive possessor of the stolen calf by virtue of the thief's actual possession; theory that constructive possessor could not "receive" same property from actual possessor did not preclude state from prosecuting accessory for being a receiver of stolen property upon his subsequent acquisition of actual possession of the calf. *State v. Webber*, 112 M 284, 116 P 2d 679, 136 ALR 1077.

**Sufficiency of Pleadings**

Under former section 94-6423 an information containing a single count charging the crime of second degree assault, as defined in former section 94-602, was proper

where only one crime was involved, namely, second degree assault, with at least two different theories upon which to base a conviction, one by a direct assault and the other by aiding and abetting. *State v. Zadick*, 148 M 296, 419 P 2d 749, 751.

**Sufficiency of Proof**

An indictment for murder, charging defendant as principal, was sustained by proof that he was guilty of advising and encouraging the crime. *State v. Geddes*, 22 M 68, 86, 55 P 919.

Under an information charging receipt of stolen property by one who became a principal by aiding and abetting another in receiving it, there was no fatal variance between the crime as alleged and the proof, showing him to have taken part only as an accessory. *State v. Huffman*, 89 M 194, 203, 296 P 789.

**94-2-108. Separate conviction of person accountable.** A person who is legally accountable for the conduct of another which is an element of an offense may be convicted upon proof that the offense was committed and that he was so accountable, although the other person claimed to have committed the offense has not been prosecuted or convicted, or has been convicted of a different offense or is not amenable to justice, or has been acquitted.

**History:** En. 94-2-108 by Sec. 1, Ch. 513, L. 1973.

**Source:** Identical to Illinois Criminal Code, Chapter 38, section 5-3.

**Commission Comment**

Even at common law two persons, both principals in the first degree, could be

tried separately and although one was acquitted, the state was not precluded from proceeding to trial and obtaining a conviction against the second. The same result is possible under this code but the classification of principals and accessories is eliminated.

**94-2-109. Responsibility.** A person who is in an intoxicated or drugged condition is criminally responsible for conduct unless such condition is involuntarily produced and deprives him of his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. An intoxicated or drugged condition may be taken into consideration in determining the existence of a mental state which is an element of the offense.

**History:** En. 94-2-109 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 53, Ch. 329, L. 1974.

**Source:** Derived from Revised Codes of Montana 1947, sections 94-201(1) and 94-119; Illinois Criminal Code, Chapter 38, section 6-3.

**Commission Comment**

Chapter 5 of Title 95, Competency of the Accused, completes the coverage of this section.

Subsection (2) is taken from Illinois Criminal Code, Chapter 38, section 6-3. This imposes a stricter limitation than the old

code section 94-119(1). Instead of involuntary intoxication being a defense it is necessary for the accused to also prove that he was thereby made mentally incompetent. The second sentence of paragraph (2) makes it clear that intoxication is no defense but is merely a fact which the jury can consider in determining the existence of a particular mental state. When intoxication has proceeded so far as to render the accused incapable of forming the particular mens rea required for the offense, the defendant is entitled to be acquitted on that charge.



### Amendments

The 1974 amendment deleted former subsection (1) which read: "No person is capable of committing any offense unless he has attained his sixteenth birthday at the time the act in question was committed. Any person who has not yet attained his eighteenth birthday shall be subject to the law as provided in Title 10,

chapter 6, R. C. M. 1947"; and deleted subsection designation (2).

### Repealing Clause

Section 54 of Ch. 329, Laws 1974 read: "Sections 10-601, 10-602, 10-603, 10-604.1, 10-605.1, 10-606, 10-607, 10-608, 10-608.1, 10-610, 10-611, 10-611.1, 10-612, 10-613, 10-614, 10-616, 10-617, 10-621, 10-622, 10-623, 10-624, 10-625, 10-626, 10-629, 10-630 and 10-633 are repealed."

## DECISIONS UNDER FORMER LAW

### Confession While Intoxicated

Under former section 94-119, confession of intoxicated defendant was voluntary and admissible in light of evidence that he was able to recite in great detail events occurring prior to and during act charged. *State v. Chappel*, 149 M 114, 423 P 2d 47.

### Insanity

Evidence that defendant's reason had been clouded by intoxication during the earlier hours of the day on which the homicide was committed, and that he suffered from periodic heart attacks, did not warrant an instruction upon the question of his sanity. *State v. Kuum*, 55 M 436, 178 P 288.

### Malice and Intoxication

Under former section 94-119, in prosecution for felony murder, ample evidence presented to jury to justify conclusion that defendant, although intoxicated, was able to entertain intent to commit the robbery during which homicide occurred, precluded review on appeal of the question of defendant's state of intoxication and his ability to entertain intent to commit the robbery. *State v. Reagin*, 64 M 481, 210 P 86.

Under former section 94-119, intoxication was not an absolute defense; if however defendant could show that the state of his intoxication was such that he was incapable of forming a malicious intent, the charge would be mitigated to a lesser offense which did not include intent as an element. Where defendant, on the day previous to an assault, told the prosecuting witness that he was going to get a gun and kill him relative to a matter occurring a year previously, and on the day of the assault, referring to it again, viciously assaulted the victim, thus showing his capacity to harbor malice, his alleged intoxication was no defense. *State v. Laughlin*, 105 M 490, 73 P 2d 718.

Where defendant was intoxicated to such an extent as to render him incapable of entertaining the purpose, intent or malice requisite for first-degree murder, the crime was properly reduced to murder in second degree. *State v. Palen*, 119 M

600, 178 P 2d 862, explained in 150 M 399, 407, 436 P 2d 91.

Under former section 94-119, in murder prosecution, jury was properly instructed that if killing was done by defendant with malice aforethought, but defendant was incapable of premeditation and deliberation because of intoxication, the crime was second-degree murder, and that if defendant was so intoxicated at the time of killing that he was incapable of harboring malice aforethought, crime was manslaughter. *State v. Brooks*, 150 M 399, 436 P 2d 91.

### Specific Intent

Since specific intent was not element of second-degree assault, the court was correct in refusing defendant's offered instruction that jury could take degree of intoxication into account in arriving at verdict in so far as it affected defendant's capacity for willfulness and intent under former section 94-119. *State v. Warrick*, 152 M 94, 446 P 2d 916.

Testimony of two witnesses that defendant was under the influence of alcohol was not sufficient to refute finding by jury that defendant was not so intoxicated as to be unable to form the requisite intent to commit larceny. *State v. Austad*, — M —, 533 P 2d 1069.

### Voluntary Intoxication

Although as a general rule, courts do not approve the giving of abstract propositions of law as instructions to juries, where the sole defense of one charged with an attempt to commit rape was intoxication, the trial court did not err in giving an instruction on voluntary intoxication in the words of subdivision 1 of former section 94-119. *State v. Stevens*, 104 M 189, 65 P 2d 212, overruled on other grounds in *State v. Bosch*, 125 M 566, 242 P 2d 477.

While voluntary intoxication was generally no defense to a criminal charge under former section 94-119, it was available as a defense where a specific intent was an essential element of the crime charged. *Alden v. State*, 234 F Supp 661, affirmed in 345 F 2d 530.



**94-2-110. Substitutes for negligence and knowledge.** When the law provides that negligence suffices to establish an element of an offense, such element also is established if a person acts purposely or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts purposely.

**History:** En. 94-2-110 by Sec. 1, Ch. 513, L. 1973.

**Source:** New.

**Commission Comment**

This section is intended to obviate any

possible misunderstanding as to what mental state will satisfy the requirements of each statutory provision. Proof of the higher or more specific mental state will satisfy any lesser mental state that may be required by a particular statute.

**94-2-111. Consent as a defense.** (1) The consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense.

(2) Consent is ineffective if:

(a) it is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense;

(b) it is given by a person who by reason of youth, mental disease or defect, or intoxication is unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense;

(c) it is induced by force, duress, or deception; or

(d) it is against public policy to permit the conduct or the resulting harm, even though consented to.

**History:** En. 94-2-111 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 13, Ch. 359, L. 1977.

**Source:** New.

**Commission Comment**

Victim consent may eliminate criminal responsibility. However, not every consent is legally valid. The state has an obligation to protect the young and the helpless from their own incapacities. For reasons

of public policy, the state may prohibit some conduct absolutely irrespective of anyone's consent.

**Amendments**

The 1977 amendment inserted "it is given by a person who" at the beginning of subsection (2)(b); and made minor changes in punctuation and phraseology.

**94-2-112. Criminal responsibility of corporations.** (1) A corporation may be prosecuted for the commission of an offense if, but only if:

(a) the offense is a misdemeanor, and is defined by sections 94-6-307, 94-6-308, 94-6-311, 94-6-312, 94-6-313, 94-8-108, 94-8-109, 94-8-111, 94-8-112, 94-8-113 of this code, or is defined by another statute which clearly indicates a legislative purpose to impose liability on a corporation; and an agent of the corporation performs the conduct which is an element of the offense while acting within the scope of his office or employment and in behalf of the corporation, except that any limitation in the defining statute, concerning the corporation's accountability for certain agents or under certain circumstances, is applicable; or

(b) the commission of the offense is authorized, requested, commanded, or performed, by the board of directors or by a high managerial agent who is acting within the scope of his employment in behalf of the corporation.

(2) A corporation's proof, that the high managerial agent having supervisory responsibility over the conduct which is the subject matter

of the offense exercised due diligence to prevent the commission of the offense, is a defense to a prosecution for any offense to which subsection (1) (a) refers, other than an offense for which absolute liability is imposed. This subsection is inapplicable if the legislative purpose of the statute defining the offense is inconsistent with the provisions of this subsection.

(3) For the purposes of this section:

(a) "Agent" means any director, officer, servant, employee, or other person who is authorized to act in behalf of the corporation.

(b) "High managerial agent" means an officer of the corporation, or any other agent who has a position of comparable authority for the formulation of corporate policy or the supervision of subordinate employees in a managerial capacity.

**History:** En. 94-2-112 by Sec. 1, Ch. 513, L. 1973.

**Source:** Identical to Illinois Criminal Code, Chapter 38, section 5-4.

#### Commission Comment

Section 94-2-112 deals with the criminal responsibility of private corporate bodies.

Subsection (1)(a) deals with the corporate liability for misdemeanor offenses, such other offenses as may be expressly included, and those which clearly indicate a legislative purpose to impose corporate liability where the offense is defined by a statute not included in the Criminal Code. In dealing with regulatory offenses, the broadest scope of liability is provided. The corporation is made criminally responsible for criminal conduct performed by any corporate employee acting within the scope of his office or employment and in behalf of the corporation. The chief justification for such broad liability in this class of cases is to provide an inducement for high managerial officers in the corporation to supervise the behavior of minor employees in such a way as to avoid criminal conduct on the part of corporate employees. In many of the regulatory offenses, the corporation which violates a criminal statute is not confronted by the threat of tort liability growing out of the same act. Thus, if the corporation is required to file a corporate report and fails to do so, the liability it will suffer may be criminal only. These provisions do not relieve the individual corporate employee from criminal liability for his own act. In many cases, criminal prosecution of the individual will prove more effective in enforcing the regulatory policy of the statute. There may be times, however, in which, while it is clear that someone in the corporate employ has committed the criminal act, it is impossible to identify the particular employee guilty of criminal behavior. In such case, the only sanction available is the imposition of a fine on the corporate body. There may also be cases

in which the criminal act is committed by a corporate employee of a foreign corporation residing outside the jurisdiction. In such a case the only feasible course open to the Montana prosecutor would be a criminal action against the corporation.

Since, however, the major purpose of subsection (1)(a) is to encourage diligence on the part of managerial personnel to prevent criminal conduct on the part of corporate employees, it seems appropriate to permit the corporation to defend by proof that the criminal conduct occurred despite the exercise of due diligence on the part of supervisory personnel. Consequently, subsection (2) provides that proof of due diligence is a defense to the criminal charge against the corporation. The burden of proof in this case, is placed upon the corporate defendant. This defense is further qualified by the provision that if the statute in question clearly intends that the defense of due diligence should not be available to the corporation, the particular provision of the statute shall prevail over the language of subsection (2).

Subsection (1)(b) relates to the scope of liability of corporations for criminal offenses of a more serious character. It provides that when a corporation is indicted for a felony such as embezzlement, or involuntary manslaughter, the corporation may not be held liable unless the criminal conduct was performed or participated in by the board of directors or by a high managerial agent. The restriction on the scope of corporate liability in this class of cases is justified by the consideration that before the stigma of serious criminality attaches to a corporate body, the conduct should involve someone close to the center of corporate power. Moreover, in these cases, the argument for the necessity of corporate fines to stimulate diligent supervision of minor employees is considerably less persuasive. This is true because most of the serious felonies also involve the possibility of corporate tort liability and this possibility should provide sufficient inducement for



the exercise of proper supervision by managerial officials. The restriction of corporate liability in the case of serious felonies to acts of participating high managerial officials is supported by the case law of some American states and appears to be consistent with the English law on the same point. (E.g., *People v. Canadian Fur Trappers Corp.*, 248 NY 159, 161 NE 455, 59 ALR 372 (1928); *Rex v. I.C.R. Haulage Ltd.* (1944) 1 K.B. 551; *Welsh*, "The

Criminal Liability of Corporations," 62 L. Q. Rev. 345 (1946).) The definitions of "agent" and "high-managerial agent" defy precise definition because of the infinite variations in the organizational schemes of corporate bodies. The definition here provided, however, is probably more precise than that which has emerged from the case law. (See especially, *People v. Canadian Fur Trappers Corp.*, 248 NY 159, 161 NE 455, 59 ALR 372 (1928).)

**94-2-113. Accountability for conduct of corporation.** (1) A person is legally accountable for conduct which is an element of an offense and which, in the name or in behalf of a corporation, he performs or causes to be performed, to the same extent as if the conduct were performed in his own name or behalf.

(2) An individual who has been convicted of an offense by reason of his legal accountability for the conduct of a corporation is subject to the punishment authorized by law for an individual upon conviction of such offense, although only a lesser or different punishment is authorized for the corporation.

**History:** En. 94-2-113 by Sec. 1, Ch. 513, L. 1973.

**Source:** Identical to Illinois Criminal Code, Chapter 38, section 5-5.

#### Commission Comment

Section 94-2-113 should make clear that an individual acting for a corporation is fully responsible for his own criminal acts and is punishable accordingly.

## CHAPTER 3

### JUSTIFIABLE USE OF FORCE—EXONERATION

#### Section 94-3-101. Definitions.

- 94-3-102. Use of force in defense of person.
- 94-3-103. Use of force in defense of occupied structure.
- 94-3-104. Use of force in defense of other property.
- 94-3-105. Use of force by aggressor.
- 94-3-106. Use of force to prevent escape.
- 94-3-107. Use of force by parent.
- 94-3-108. Use of force in resisting arrest.
- 94-3-109. Execution of death sentence.
- 94-3-110. Compulsion.
- 94-3-111. Entrapment.
- 94-3-112. Affirmative defense.

**94-3-101. Definitions.** (1) "Forceible felony" means any felony which involves the use or threat of physical force or violence against any individual.

(2) "Force likely to cause death or serious bodily harm" within the meaning of this chapter includes but is not limited to:

(a) the firing of a firearm in the direction of a person, even though no purpose exists to kill or inflict serious bodily harm; and

(b) the firing of a firearm at a vehicle in which a person is riding.

**History:** En. 94-3-101 by Sec. 1, Ch. 513, L. 1973.

**Source:** Substantially the same as Illinois Criminal Code, Chapter 38, section 7-8.

#### Commission Comment

This section is intended to make clear the status of the practice of firing in the direction of any person. In some circum-



stances a peace officer may be authorized to use deadly force. While firing into the air without endangering an offender's safety is permissible, firing so close to him that his safety is endangered is the use of deadly force, which can be justified only in the circumstances in which the officer is

authorized to use deadly force. (See Perkins, "The Law of Arrest," 25 Iowa L. Rev. 201 at 270, 288, 289 (1940); Note, "Use of Deadly Force in Preventing Escape of Fleeing Minor Felon," 34 N.C. L. Rev. 122 (1955).)

**94-3-102. Use of force in defense of person.** A person is justified in the use of force or threat to use force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force. However, he is justified in the use of force likely to cause death or serious bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or serious bodily harm to himself or another, or to prevent the commission of a forcible felony.

**History:** En. 94-3-102 by Sec. 1, Ch. 513, L. 1973.

**Source:** Identical to Illinois Criminal Code, Chapter 38, section 7-1.

#### Commission Comment

The law of self-defense has been interpreted in a large number of judicial decisions, agreeing in principle though differing somewhat in defining the borderlines such as the minimum situation in which the use of deadly force may be authorized. (The history of self-defense is traced in Perkins, "Self-Defense Re-examined," 1 U.C.L.A. L. Rev. 133 at 137 to 142 (1954).) This section presents the general rule as to defense of person contemplating the simplest and probably most common situation—that in which a person who has done nothing to provoke the use of force against himself is confronted immediately with unlawful force under such circumstances that he believes that he must use force to defend himself, and his belief is reasonable. This statement contains several propositions:

(1) The person must not be the aggressor (the situation considered in section 94-3-105);

(2) The danger of harm must be a present one, not merely threatened at a future time, or without the present ability of carrying out the threat;

(3) The force threatened must be unlawful—either criminal or tortious;

(4) A person must actually believe that the danger exists, that his use of force is necessary to avert the danger, and that the kind and amount of force which he uses is necessary; and

(5) His belief, in each of the aspects described, is reasonable even if it is mistaken. The privilege extends to the protection not only of the person using the force, but of other individuals unlawfully

threatened with harm; and in determining whether the use of force is necessary, a person need not consider whether the danger might be avoided if he were to give up some legal right or privilege. If a person under these circumstances uses only non-deadly force for protection, no further legal restriction should be necessary. (See Perkins, *supra*, at pages 133 to 137.)

The privilege of using force likely to cause death or serious bodily harm (often called deadly force) is limited to cases in which the force imminently threatened apparently will cause death or serious bodily harm, or in which a violent offense is being committed which in its nature involves serious risk of serious bodily harm, such as rape, robbery, burglary, arson or kidnapping.

This section codifies prior Montana law in which the section is intended to test the right of self-defense as measured by what a reasonable person would have done under like or the same circumstances. (State v. Houk, 34 M 418, 423, 87 P 175.) A person attacked can act upon appearances and might justifiably kill his attacker, though not in actual peril if the circumstances are such that a reasonable man would be justified in acting the same way. Further, a person attacked with apparent murderous intent need not retreat and seek a place of safety before using deadly force on his attacker. (State v. Merk, 53 M 454, 460, 164 P 655.) However, whether the circumstances attending a homicide claimed to have been committed in self-defense, are such as to justify a defendant's fears, as a reasonable person, in the belief that he was in imminent danger of losing his life or suffering serious bodily harm at the hands of the deceased, is a question of fact for the jury; bare fear of an assault does not justify the killing. (State v. Harkins, 85 M 585, 602, 281 P 551.)

## DECISIONS UNDER FORMER LAW

**Defense of Others**

The provisions of former section 94-2513 put persons acting in defense of others upon the same plane as those acting in defense of themselves. Every fact, therefore, which would be competent to establish justification in the one case would, for the same reasons, be competent to establish it in the other. *State v. Felker*, 27 M 451, 458, 71 P 668.

**Excessive Force**

Defendant who fired bullet through apartment door striking investigating police officer, who was privileged to open apartment door to limit of night latch and who announced that he was policeman, used excessive force and was properly convicted of first degree assault. *State v. Lukus*, 149 M 45, 423 P 2d 49.

**Instructions to Jury**

Court properly refused defendant's instruction relative to self-defense where there was no evidence whatever that defendant acted under reasonable apprehension of death or great bodily harm and where witnesses for state gave no indication that defendant acted in fear nor did defendant himself claim that he acted under any fear of harm. *State v. Brooks*, 150 M 399, 436 P 2d 91.

Instruction on self-defense was not required in the absence of evidence of apprehension of harm to herself by defendant but where all of defendant's evidence tended to establish accident or justifiable homicide as defense. *State v. Eisenman*, 155 M 370, 472 P 2d 857.

**Prior Acts or Threats**

Testimony as to prior threats by deceased, though not communicated to defendant, was admissible to characterize decedent's conduct. *State v. Shadwell*, 26 M 52, 66 P 508; *State v. Felker*, 27 M 451, 71 P 668, distinguished in 109 M 303, 313, 97 P 2d 330; *State v. Whitworth*, 47 M 424, 133 P 364, distinguished in 109 M 303, 313, 97 P 2d 330.

It was reversible error to instruct the jury to disregard prior threats by decedent unless the accused, at the time of the killing, was actually assailed, or believed he was in great bodily danger. *State v. Shadwell*, 26 M 52, 66 P 508.

On issue whether defendant, when he killed deceased, believed that deceased was about to assault his wife—defendant's sister—testimony showing that, to defendant's knowledge, deceased had made prior assaults on his wife, was admissible, and the fact that the prior assaults occurred more than two weeks before did

not make evidence inadmissible as too remote. *State v. Felker*, 27 M 451, 71 P 668, distinguished in 88 M 21, 28, 289 P 1037.

Testimony as to prior acts of violence and threats by deceased communicated to defendants is admissible as to the defendant's state of mind when coupled with evidence of some overt act by the deceased. *State v. Hanlon*, 38 M 557, 100 P 1035, distinguished in 109 M 303, 313, 97 P 2d 330.

Fact that decedent had to defendant's knowledge inflicted serious injury to another man about a year before was admissible on question of defendant's apprehension of danger to himself, and refusal to admit such evidence was reversible error. *State v. Jennings*, 96 M 80, 28 P 2d 448.

**Reasonable Fear**

Under former section 94-2514, in a prosecution for murder, where the defendant relied upon the plea of self-defense, an instruction which made the measure of justification "that sense of danger appearing to the defendant, and to men or individuals of his race, standing, individuality, and intelligence," was properly refused where another instruction covered the reasonable man standard on self-defense. *State v. Cadotte*, 17 M 315, 320, 42 P 857.

An instruction in a prosecution for murder that the right of self-defense was to be measured by what a reasonable person would have done under like or the same circumstances, conformed to the requirements of former section 94-2513, and was sufficient to state the right of self-defense. *State v. Houk*, 34 M 418, 423, 87 P 175.

Under former section 94-2513, a person assailed could act upon appearances as they presented themselves to him, meet force with force, and even slay his assailant; and, though in fact he was not in any actual peril, yet if the circumstances were such that a reasonable man would be justified in acting as he did, the slayer will be held blameless. *State v. Merk*, 53 M 454, 460, 164 P 655.

Under former section 94-2514, whether the circumstances attending the homicide claimed by defendant to have been committed in self-defense, were such as to justify his fears, as a reasonable person, in the belief that he was in imminent danger of losing his life or suffering great bodily harm at the hands of deceased, was a question of fact for the jury; bare fear on his part of an assault by the latter, of a quarrelsome and violent disposition, was not alone insufficient to justify the killing. *State v. Harkins*, 85 M 585, 281 P 551.

Under former section 94-2514, where self-defense was pleaded to a charge of



homicide, the question whether the circumstances were such as to justify defendant's fears, as a reasonable person, in the belief that he was in imminent danger of losing his life or suffering great bodily harm at the hands of deceased, was for the jury. *State v. Fine*, 90 M 311, 316, 2 P 2d 1016.

A person has the right to defend himself against what he reasonably believes to be a threat of death or great bodily harm even though the danger is not real, and the failure to make this distinction in a self-defense instruction in an assault prosecution is reversible error. *State v. Daw*, 99 M 232, 43 P 2d 240.

Under former section 94-605, where the evidence in a prosecution for assault warrants the giving of instructions on self-defense relating to the rights of defendant in resisting an attack by three or more persons committing a tumultuous trespass, the court should have pointed out to the jury the essential differences between an assault by such a body of men and that by an individual. *State v. Daw*, 99 M 232, 238, 43 P 2d 240.

**94-3-103. Use of force in defense of occupied structure.** A person is justified in the use of force or threat to use force against another when and to the extent that he reasonably believes that such conduct is necessary to prevent or terminate such other's unlawful entry into or attack upon an occupied structure. However, he is justified in the use of force likely to cause death or serious bodily harm only if:

(1) the entry is made or attempted in violent, riotous, or tumultuous manner, and he reasonably believes that such force is necessary to prevent an assault upon, or offer of personal violence to him or another then in the occupied structure; or

(2) he reasonably believes that such force is necessary to prevent the commission of a forcible felony in the occupied structure.

**History:** En. 94-3-103 by Sec. 1, Ch. 513, L. 1973.

**Source:** Substantially the same as Illinois Criminal Code, Chapter 38, section 7-2.

#### **Commission Comment**

This aspect of justification seems to be rather well-settled: a person may prevent or repel with force another's unlawful entry into a dwelling, whether the dwell-

#### **Reputation of Decedent**

Evidence of reputation of decedent for turbulence and violence was admissible, even though unknown to defendant, where there was a question as to which party was the aggressor. *State v. Jones*, 48 M 505, 139 P 441, distinguished in 109 M 303, 313, 97 P 2d 330.

#### **Retreat by Defendant**

A person assailed with apparent murderous intent need not retreat and seek a place of safety before slaying his assailant. *State v. Merk*, 53 M 454, 460, 164 P 655.

#### **Unarmed Assailant**

Under former section 94-2513, where defendant pleading self-defense to a charge of murder was a much smaller and weaker man than deceased, the fact that after the first blow the latter lost his weapon did not deprive defendant of his right to claim self-defense in thereafter retaliating with a knife, since in view of the disparity in physique he could reasonably apprehend great bodily harm to himself even though his assailant was unarmed. *State v. Jennings*, 96 M 80, 88, 28 P 2d 448.

ing is occupied by the person using such force or by someone else, and whether the trespasser uses force or enters without force; but the use of deadly force is limited to instances of violent or forcible felonies and violent entries with apparent threat of personal violence to someone in the occupied structure. The reasonable-belief and no-retreat principles apply.

### **DECISIONS UNDER FORMER LAW**

#### **Excessive Force**

Defendant who fired bullets through apartment door striking investigating police officer was properly convicted of first-degree assault for use of excessive force where the police officer was privi-

leged to open the apartment door to the limit of the night latch and where he announced that he was a policeman prior to the firing of the shot. *State v. Lukus*, 149 M 45, 423 P 2d 49.



**Justifiable Force**

Defendant was justified in pointing a loaded revolver at an unknown person entering his home after he had forcibly evicted an unauthorized occupant and had had timber stolen, and the fact that defendant surrendered his weapon after identifying the person entering indicated that he had no intention to fire except in defense of his home. *State v. Nickerson*, 126 M 157, 247 P 2d 188.

**Possession Necessary for Defense**

Under former section 94-605, subdivision 3, defendant who had been in peaceable possession of the premises, as owner thereof for months, had the right to defend such possession, provided he used no more force than was necessary for that purpose; it was error to refuse an instruction to that effect. *State v. Howell*, 21 M 165, 169, 53 P 314.

**94-3-104. Use of force in defense of other property.** A person is justified in the use of force or threat to use force against another when and to the extent that he reasonably believes that such conduct is necessary to prevent or terminate such other's trespass on or other tortious or criminal interference with either real property (other than an occupied structure) or personal property, lawfully in his possession or in the possession of another who is a member of his immediate family or household or of a person whose property he has a legal duty to protect. However, he is justified in the use of force likely to cause death or serious bodily harm only if he reasonably believes that such force is necessary to prevent the commission of a forcible felony.

**History:** En. 94-3-104 by Sec. 1, Ch. 513, L. 1973.

**Source:** Substantially the same as Illinois Criminal Code, Chapter 38, section 7-3.

**Commission Comment**

The general principles of justification concerning the defense of person and occupied structure are applicable to a limited extent to the defense of real property other than an occupied structure, and personal property lawfully in the person's possession (or the possession of certain other persons): he may use force which he reasonably believes to be necessary to protect the property, but he may not use

deadly force except to prevent the commission of a forcible felony.

The right of a person to use force in preventing a trespass upon or interference with another person's property is limited to property in the possession of a member of the immediate family or household of the person using the preventive force, or is property the person using the preventive force has a legal duty to protect. The right of a private person to arrest one who commits or attempts a criminal offense in his presence supplements the right to use force in the defense of other property. See R. C. M. 1947, section 95-611.

**DECISIONS UNDER FORMER LAW****Game Law Violation**

Landowner had a constitutionally protected right to kill elk out of season when necessary to prevent damage to his pastur-

age and other property and all other measures had failed. *State v. Rathbone*, 110 M 225, 100 P 2d 86.

**94-3-105. Use of force by aggressor.** The justification described in the preceding sections of this chapter is not available to a person who:

(1) is attempting to commit, committing, or escaping after the commission of a forcible felony; or

(2) purposely or knowingly provokes the use of force against himself, unless:

(a) such force is so great that he reasonably believes that he is in imminent danger of death or serious bodily harm, and that he has exhausted every reasonable means to escape such danger other than the use

of force which is likely to cause death or serious bodily harm to the assailant; or

(b) in good faith, he withdraws from physical contact with the assailant and indicates clearly to the assailant that he desires to withdraw and terminate the use of force, but the assailant continues or resumes the use of force.

**History:** En. 94-3-105 by Sec. 1, Ch. 513, L. 1973.

**Source:** Substantially the same as Illinois Criminal Code, Chapter 38, section 7-4.

#### Commission Comment

Each of the preceding sections of this chapter has assumed that the person using force in defense has not committed an unlawful act which has inspired the use or threat of force against him, and has not otherwise provoked such force. This section concerns the much more limited right which a person has to defend himself, when he has committed an unlawful act or otherwise provoked the use of force. A person has no right of defense if he is attempting or committing a forcible felony, or is escaping after committing it; or if he has deliberately provoked the use of force against himself. Only a completed withdrawal, followed by a new encounter initiated by the other person, will reinstate a right of defense. (See Perkins, "Self-Defense Re-Examined," 1 U.C.L.A. L. Rev. 133 at 147 (1954).) However, if a person voluntarily engages in a fight or in some other manner, by words or actions provokes the use of force against himself which apparently will not involve the use

of deadly force, but unexpectedly is threatened with deadly force, he has a qualified right to protect himself by using deadly force. First, however, the original provocateur must use any method which is reasonably available to avoid the use of deadly force including a "retreat to the wall."

Subsections (2)(a) and (b) outline the cases in which the aggressor's right of self-defense is reinstated. The first is that which obtains when the aggressor, not using deadly force, is suddenly confronted with deadly force and has retreated, as he reasonably believes, to the practical limit but nevertheless reasonably believes that he must use deadly force to prevent death or serious bodily harm to himself.

The second case is that in which the aggressor in good faith withdraws from the conflict and effectively communicates to the victim his intention to withdraw, but the victim continues or resumes the conflict. The relation between the participants should be regarded as reversed, the initial aggressor becoming the victim. Section (2)(b) applies only to the use of nondeadly force in self-defense. (See State v. Merk, 53 M 454, 460, 164 P 655.)

#### DECISIONS UNDER FORMER LAW

##### Withdrawal from Combat

Under former sections 94-2513 and 94-2514, if the party committing the homicide was the assailant, or engaged in mortal combat, he must in good faith have en-

deavored to decline any further struggle before the killing was done, otherwise he could not invoke self-defense. State v. Merk, 53 M 454, 164 P 655.

**94-3-106. Use of force to prevent escape.** (1) A peace officer or other person who has an arrested person in his custody is justified in the use of such force to prevent the escape of the arrested person from custody as he would be justified in using if he were arresting such person.

(2) A guard or other peace officer is justified in the use of force, including force likely to cause death or serious bodily harm, which he reasonably believes to be necessary to prevent the escape from a correctional institution of a person whom the officer reasonably believes to be lawfully detained in such institution under sentence for an offense or awaiting trial or commitment for an offense.

**History:** En. 94-3-106 by Sec. 1, Ch. 513, L. 1973.

**Source:** Identical to Illinois Criminal Code, Chapter 38, section 7-9.

#### Commission Comment

An attempted escape by a person in custody after arrest and before being placed in confinement, or in a place of confine-



ment, requires the authorization of force necessary to recapture him. This section concerns the use of deadly force to prevent escape and not the use of force which is justifiable in making the original arrest.

The usual statement seems to be that a person lawfully arrested or confined may be killed if that is necessary to prevent escape; and no distinction is drawn between a felon and any other offender.

Recapture must be evaluated in the same manner as if it were an original arrest, and whether deadly force may be used to prevent an escape does not depend upon whether such force might have been authorized at the time of the original arrest. If the offense for which the person was arrested was not a forcible felony, but the offender was armed with a deadly weapon, deadly force might have been used to effect the arrest. If the offender was arrested and disarmed and later attempted to escape unarmed and without threatening death or serious bodily harm to anyone, deadly force to prevent his escape is not authorized. Conversely, if the offender was not armed or otherwise dangerous when arrested, but in attempting to escape he commits a forcible felony, or seizes an officer's gun and threatens to shoot anyone who opposes his escape,

deadly force may be used to prevent the escape.

Subsection (2) concerns escape from a place of confinement, as distinguished from personal custody after arrest. Here, other persons are likely to be in the same position of legal restraint as the one attempting to escape and may be encouraged by a successful escape to make a similar attempt either immediately or at a later time. Also, a guard or other person in charge of prisoners cannot be expected to know the history of each prisoner and whether his offense was a forcible felony or whether he is likely to endanger the lives of others if his escape is successful. In addition, the sudden and unexpected nature of an escape from confinement leaves the guard no time to investigate into the person's possession of a deadly weapon. In view of the often desperate nature of an escape of this kind, the prisoner can be expected to use any deadly force which he finds available. Consequently, a less restrictive rule as to the use of deadly force to prevent escape seems logical with respect to a guard, as compared with the rule concerning a personal custodian after the arrest but before the confinement of an offender or suspect.

**94-3-107. Use of force by parent.** A parent or an authorized agent of any parent or a guardian, master, or teacher is justified in the use of such force as is reasonable and necessary to restrain or correct his child, ward, apprentice or pupil.

**History:** En. 94-3-107 by Sec. 1, Ch. 513, L. 1973.

**Source:** Substantially the same as Revised Codes of Montana 1947, section 94-605(4).

#### Commission Comment.

This is a rewording of former section 94-605 (4). However "reasonable and necessary" was substituted for "reasonable in manner and moderate in degree."

### DECISIONS UNDER FORMER LAW

#### Instructions

Stepfather charged with murder in alleged beating death of his stepchild was entitled to instructions on voluntary and involuntary manslaughter in view of testimony that his striking the child was for disciplinary purposes and that he never intended to hurt her. *State v. Taylor*, — M —, 515 P 2d 695.

#### Reasonable and Moderate

Under subdivision 4 of former section 94-605, a person standing in loco parentis was not entitled to a presumption that

punishment was reasonable and moderate, but state must prove that parent's act was willful, wrongful and unlawful and, in order to convict, jury must find that punishment was clearly unreasonable and immoderate after considering all the circumstances including (1) the age and understanding of the child, (2) the nature and seriousness of the act being punished, (3) the instrument used for punishment and (4) the severity and permanent or temporary nature of the resulting injuries. *State v. Straight*, 136 M 255, 347 P 2d 482.

**94-3-108. Use of force in resisting arrest.** A person is not authorized to use force to resist an arrest which he knows is being made either by a peace officer or by a private person summoned and directed by a peace



officer to make the arrest, even if he believes that the arrest is unlawful and the arrest in fact is unlawful.

**History:** En. 94-3-108 by Sec. 1, Ch. 513, L. 1973.

**Source:** Identical to Illinois Criminal Code, Chapter 38, section 7-7.

#### Commission Comment

Section 94-3-108 states a corollary to the justification accorded to an officer in using force to make an arrest. Even if the arrest is unlawful, the person arrested is not privileged to resist the arrest with force. A resort to force invites the officer to use greater force to accomplish the arrest. The public interest in discouraging violence and insisting upon the use of peaceable methods for obtaining release from unlawful arrest clearly outweighs the right

of self-help or any momentary individual satisfaction. (This was the view of the Uniform Arrest Act, § 6: see Warner, "The Uniform Arrest Act," 28 Va. L. Rev. 316 at 330, 331 (1942).) A partial recognition of the inadvisability of sanctioning resistance in the case of an unlawful arrest appears in the old rule that a person who kills an officer attempting an unlawful arrest is not justified, but is guilty of manslaughter rather than murder, in the absence of express malice. (1 Wharton's Criminal Law (12th ed.) §§ 542 and 853; 1 Bishop on Criminal Law (9th ed.) § 868 and 1 Bishop's New Criminal Procedure (3rd ed.) § 162.)

**94-3-109. Execution of death sentence.** A public servant who, in the exercise of his official duty, puts a person to death pursuant to a sentence of a court of competent jurisdiction, is justified if he acts in accordance with the sentence pronounced and the law prescribing the procedure for execution of a death sentence.

**History:** En. 94-3-109 by Sec. 1, Ch. 513, L. 1973.

**Source:** Identical to Illinois Criminal Code, Chapter 38, section 7-10.

#### Commission Comment

This section states an obvious aspect of justification for homicide. It is included for the sake of completeness, and because it is one of the more commonly described statutory instances of justification. Section 94-3-109 is intended to state the

essentials of the prior provision in language similar to that of the other sections of this chapter. However, in view of the deliberate nature of the homicide, the explicit legal instructions concerning the execution and the much more relaxed time element involved in an execution as compared with self-defense, arrest, or escape, no need exists for recognizing a reasonable but mistaken belief of the executioner as to his authority for or method of performing his duty.

**94-3-110. Compulsion.** A person is not guilty of an offense, other than an offense punishable with death, by reason of conduct which he performs under the compulsion of threat or menace of the imminent infliction of death or serious bodily harm, if he reasonably believes that death or serious bodily harm will be inflicted upon him if he does not perform such conduct.

**History:** En. 94-3-110 by Sec. 1, Ch. 513, L. 1973.

**Source:** Substantially the same as Illinois Criminal Code, Chapter 38, section 7-11.

#### Commission Comment

Compulsion, coercion, or duress is another long-recognized basis for finding a person not guilty of an offense charged, although his conduct appears to be within the definition of the offense. The justification does not extend to action under threat of damage to property, or of injury less than serious bodily harm or even of death or serious bodily harm which is not imminent; but the person's reasonable fear of

imminent death or serious bodily harm if mistaken, is within the principle. (See 1 Bishop on Criminal Law (9th ed.) §§ 346 to 348.)

This established type of formulation has been criticized. However, to broaden the defense to accord completely with the "free will" theory would be to invite routine contentions of some kind of pressure, such as "threats of harm to property, reputation, health, general safety, and to acts done under the orders," with accompanying assertion of individual personality weakness. (Newman and Weitzer, *supra*, at 334.) Prof. Wharton, after stating the established restrictions upon the defense, comments: "It would be a most dangerous

rule if a defendant could shield himself from prosecution for crime by merely setting up a fear from or because of threat

of a third person." (1 Wharton's Criminal Law (19th ed.), ¶ 384.)

**94-3-111. Entrapment.** A person is not guilty of an offense if his conduct is incited or induced by a public servant, or his agent for the purpose of obtaining evidence for the prosecution of such person. However, this section is inapplicable if a public servant or his agent, merely affords to such person the opportunity or facility for committing an offense in furtherance of criminal purpose which such person has originated.

**History:** En. 94-3-111 by Sec. 1, Ch. 513, L. 1973.

**Source:** Identical to Illinois Criminal Code, Chapter 38, section 7-12.

#### Commission Comment

The defense of entrapment generally follows the rule stated by the majority in the Sorrells case. (See "The Doctrine of Entrapment and Its Application in Texas," 9 Sw. L. J. 456 (1955); Note, 28 N.Y.U. L. Rev. 1180 (1953) recognizing three principal elements: (1) The idea of committing an offense originates, not with the

suspect, but with the enforcement authorities, who (2) actively encourage the suspect to commit the offense, (3) for the purpose of obtaining evidence for his prosecution.)

Most of the cases in which entrapment has been alleged involved a course of conduct, resulting apparently in repeated offenses of the same type or in a continuing offense, such as violation of the Medical Practice Act, illegal sale of liquor or narcotics or explosives, larceny, and ticket scalping.

**94-3-112. Affirmative defense.** A defense of justifiable use of force, based on the provisions of this chapter is an affirmative defense.

**History:** En. 94-3-112 by Sec. 1, Ch. 513, L. 1973.

**Source:** Substantially the same as Illinois Criminal Code, Chapter 38, section 7-14.

#### Commission Comment

A defense based upon any of the provisions of this chapter is an affirmative defense, and if not put in issue by the prosecution's evidence, the defendant, to raise it as an issue, must present some evidence thereon.

### DECISIONS UNDER FORMER LAW

#### Burden of Proof

Testimony of defendant that he had acted in self-defense did not shift burden of proof to state to prove the falsity of his testimony since defendant had

burden of producing sufficient evidence on issue of self-defense to raise a reasonable doubt of his guilt. State v. Grady, — M —, 531 P 2d 681.

## CHAPTER 4

### INCHOATE OFFENSES

- Section 94-4-101. Solicitation.  
94-4-102. Conspiracy.  
94-4-103. Attempt.

**94-4-101. Solicitation.** (1) A person commits the offense of solicitation when, with the purpose that an offense be committed, he commands, encourages or facilitates the commission of that offense.

(2) A person convicted of solicitation shall be punished not to exceed the maximum provided for the offense solicited.

**History:** En. 94-4-101 by Sec. 1, Ch. 513, L. 1973.

**Source:** Substantially the same as Illinois Criminal Code, Chapter 38, section 8-1.

#### Commission Comment

Solicitation is not a separate statutory offense under the old code although R. C. M. 1947, section 94-204 provided that any



person counseling, advising or encouraging children under fourteen years, lunatics, or idiots, to commit any offense shall be prosecuted and punished the same as if he had committed the offense. It seems desirable to include solicitation as an offense in the traditional triad of inchoate

offenses as other states have done. In all cases the actor must have the requisite "purpose" of "promoting or facilitating" commission of an offense.

Subsection (2) provides the same maximum penalty for solicitation as may be imposed for the principal offense solicited.

### DECISIONS UNDER FORMER LAW

#### Felony Murder Rule

Where defendant hired two men to set fire and burn his service station, and during the course of the arson the two men were burned and subsequently died, the defendant was guilty of first degree murder under the felony murder rule since any death directly attributable to a plot to commit arson makes all the conspirators in the arson plot equally guilty of first degree murder. *State v. Morran*, 131 M 17, 306 P 2d 679.

#### Instructions to Jury

An instruction that a person who "advised or encouraged" another in the commission of a crime was to be considered a principal, instead of "advised and encouraged," the phrase used in former section 94-204, was not prejudicially erroneous, since the words "advised" and "encouraged" are synonymous in popular meaning. *State v. Allen*, 34 M 403, 416, 87 P 177.

In a prosecution for arson, where there was some testimony that defendant procured another to set the fire, the giving of instructions embodying the provisions of former sections 94-204 and 94-6423 was proper, as was the refusal of others directing the jury to find for the defendant unless satisfied beyond a reasonable doubt that he was present personally and set the fire himself. *State v. Chevigny*, 48 M 382, 385, 138 P 257.

**94-4-102. Conspiracy.** (1) A person commits the offense of conspiracy when, with the purpose that an offense be committed, he agrees with another to the commission of that offense. No person may be convicted of conspiracy to commit an offense unless an act in furtherance of such agreement has been committed by him or by a coconspirator.

(2) It shall not be a defense to conspiracy that the person or persons with whom the accused has conspired:

- (a) has not been prosecuted or convicted; or
- (b) has been convicted of a different offense; or
- (c) is not amenable to justice; or
- (d) has been acquitted; or
- (e) lacked the capacity to commit the offense.

(3) A person convicted of the offense of conspiracy shall be punished not to exceed the maximum sentence provided for the offense which is the object of the conspiracy.

Instructions substantially in the words of former sections 94-204 and 94-6423, defining a principal and telling the jury that the distinction between a principal and an accessory had been abrogated by statute, were not improper as implying that a felony had been committed. *State v. Wiley*, 53 M 383, 387, 164 P 84.

#### Larceny

Defendant who encourages and advises the crime of larceny is guilty as a principal, so that the testimony of the thief must be corroborated to convict for the related crime of receiving stolen property. *State v. Keithley*, 83 M 177, 271 P 449.

The fact that defendant may have been guilty of larceny by advising and encouraging the thief does not prevent him from being prosecuted instead for receiving the same stolen property. *State v. Webber*, 112 M 284, 116 P 2d 679.

#### Presence on Scene

One who advised and encouraged commission of a crime may be found guilty without having been present at the actual commission of the crime. *State v. Quinlan*, 84 M 364, 275 P 750.

Even though there was no evidence placing defendant at scene of crime, he could be held as an accomplice to larceny in view of possession of stolen property and other corroborating evidence. *State v. Gray*, 152 M 145, 447 P 2d 475.



**History:** En. 94-4-102 by Sec. 1, Ch. 513, L. 1973.

**Source:** Substantially the same as Illinois Criminal Code, Chapter 38, section 8-2; also derived from Revised Codes of Montana 1947, sections 94-1101 and 94-7211.

#### Commission Comment

Section 94-4-102 provides for several changes in the law of conspiracy in Montana.

The purpose element in conspiracy has often proved elusive and difficult to identify because it is easily confused with the purpose element involved in the principal offense which is the object of the conspiracy. However, the very nature of the offense requires a purpose separate and distinct from the purpose required in a prosecution for the principal offense which is the object of the conspiracy. Since an agreement (by words, acts or understanding) is required, there must be (1) a purpose to agree, and the agreement must be accomplished with (2) a purpose that the offense which is the object of the agreement be committed. Statutes in other jurisdictions have attempted to spell out in more detail, and in various terminology, the two-fold nature of the purpose required. The commission felt that if the inchoate nature of conspiracy is kept in mind, the provision as drafted should be sufficiently clear. In addition, since the object of the conspiracy has been limited to criminal activity, there seems to be no compelling reason to express a statutory requirement of "corrupt motive" or "evil purpose."

**Currently, acquittal of all conspirators but one absolves that one, since, theoretically, there must be at least two guilty parties to a conspiracy. However, this rationale is rejected as being too technical and overlooking the realities of trials which involve differences in juries, contingent availability of witnesses, the varying ability of different prosecutors and defense attorneys, etc. If the defendant obtains a full and fair trial what happened to another defendant at another time and place in another trial before a different judge and jury should not be a bar to a conviction.**

Subsection (1) provides a defense if the accused would not be guilty of an offense if the conduct which is the object of the conspiracy is performed. Subdivision (2) (e) goes further and says that it is not a

defense for the accused to say that his coconspirator would not be guilty of an offense if the conduct which is the object of the conspiracy were to be performed. Subdivision (2)(e) intended to deny to an accused who has no legal incapacity or immunity in relation to the principal offense, any rights, benefits, advantages, or defenses which the law may have conferred upon a coconspirator. This probably involves no change in the general rule of law which denies to an accused the legal disabilities of an accomplice, but probably (in conjunction with subdivision (2)(d)) involves a change in the present law of conspiracy where there are only two conspirators and the coconspirator has been acquitted because he lacks the capacity, due to some legal disability, to commit conspiracy.

One other important change should be noted: under subsection (1) conspiracy is committed when (with the required purpose) there is an agreement to commit any offense; this eliminates the possible application of the so-called "Wharton Rule" in conspiracy, which says that if the object of the agreement is a crime which (by its very nature) requires two or more persons to commit it, then the agreement does not amount to conspiracy because no greater danger is presented by the plurality of actors in the conspiracy than would be presented to the community in the commission of the principal offense. The commission felt that the Wharton Rule fails to take into account the preventive aspect of prosecuting conspiracies, that is, to discourage the more dangerous criminal activity of several persons by punishing the preliminary agreement to engage in such activity. That the criminal activity is of such nature as to inevitably require more than one person in its accomplishment seems the more reason to abrogate the Wharton Rule.

The problem of the extent of the conspiracy, as to multiple parties, multiple objects, or duration of the agreement has been a constant source of litigation, especially in the federal courts. An immense variety of factual situations are possible in this area, each with its own special considerations. Attempts to cover one or more of the possible fact situations by statute merely leads to the necessity of trying to cover more, so that the statutory provisions become so detailed as to risk non-coverage of fact situations through exclusion.

#### DECISIONS UNDER FORMER LAW

##### Allegations in Indictment

Under former section 94-1101, an indictment for a conspiracy to cheat and defraud a county had to allege the means by which the conspiracy was to be accom-

plished. An allegation that the defendants conspired "to cheat and defraud" was not sufficient. *Territory v. Carland*, 6 M 14, 15, 9 P 578.

**Degrees of Crime**

Different conspirators could be convicted of different degrees of homicide arising out of the same act. *State v. Alton*, 139 M 479, 365 P 2d 527.

**Evidence against Coconspirator**

After proof of a conspiracy, evidence of the acts or declarations of a conspirator relating to the object of the conspiracy may be admitted against a coconspirator. *State v. Dotson*, 26 M 305, 67 P 938.

**Evidence of Conspiracy**

Finding that there was a conspiracy was supported by evidence that within a few minutes' time prison inmates took complete control of the inside of the prison and made hostages of all custodial personnel

inside. *State v. Alton*, 139 M 479, 365 P 2d 527.

**Presence on Scene**

Conspirator may be convicted of crime without having been present at the actual commission of a crime. *State v. Quinlan*, 84 M 364, 275 P 750.

**Responsibility of Conspirator**

Prison inmate who took active part in inmate uprising, including taking of hostages and acting as spokesman for the inmates, could be held responsible for killing of guard during the course of the uprising, even though he was not present at the killing and even though the inmate who had done the shooting was dead. *State v. Alton*, 139 M 479, 365 P 2d 527.

**94-4-103. Attempt.** (1) A person commits the offense of attempt when, with the purpose to commit a specific offense, he does any act toward the commission of such offense.

(2) It shall not be a defense to a charge of attempt that because of a misapprehension of the circumstances it would have been impossible for the accused to commit the offense attempted.

(3) A person convicted of the offense of attempt shall be punished not to exceed the maximum provided for the offense attempted.

(4) A person shall not be liable under this section, if under circumstances manifesting a voluntary and complete renunciation of his criminal purpose, he avoided the commission of the offense attempted by abandoning his criminal effort.

(5) Proof of the completed offense does not bar conviction for the attempt.

**History:** En. 94-4-103 by Sec. 1, Ch. 513, L. 1973.

**Source:** Derived from Revised Codes of Montana 1947, section 94-4711.

**Commission Comment**

As under prior law, it is not necessary that the attempt fail in order to sustain a conviction under this section. It is important to note that the "double jeopardy" statute applies and the attempt is an "included offense" if the attempt is successful.

One charged with an attempt to commit a crime may properly be convicted even though the evidence shows that the crime was completed. (*State v. Benson*, 91 M 21, 25, 5 P 2d 223.)

Subsection (1) requires a purpose to commit a specific offense and an act toward the commission of that offense.

Subsection (2) is intended to codify the general rule that a factual or legal impossibility (as distinguished from an in-

herent impossibility) is no defense to attempt. The phrase "misapprehension of the circumstances" is intended to include both factual and legal circumstances. An example of inherent impossibility would be an attempt to kill by witchcraft and is not intended to be excluded as a defense. However, factual impossibility (attempting to pick an empty pocket), or legal impossibility (attempting to receive stolen goods which are not stolen) would be no defense.

This attempt statute is designed to cover all special attempt provisions in the old code, such as "attempted arson," "attempted burglary," etc.

**Voluntary Abandonment**

Fact that defendant had left scene of attempted break-in before police arrived and was apprehended two blocks from scene gave rise to possible inference of voluntary abandonment, but was not conclusive evidence as matter of law. *State v. Radi*, — M —, 542 P 2d 1206.

## DECISIONS UNDER FORMER LAW

**Completed Crime**

One charged with an attempt to commit a crime could properly be convicted as charged, under former section 94-4710, even though the evidence showed that the crime had been completed. *State v. Benson*, 91 M 21, 5 P 2d 223.

**Intent**

Testimony that defendant, six days before, had solicited witness to join in a holdup, but without naming a specific victim, was insufficient to establish intent to rob when defendant committed a battery in a crowded bar but then did not do anything else toward the commission of a

robbery. *State v. Hanson*, 49 M 361, 141 P 669.

**Punishment**

Under former section 94-4711, where the evidence was not before the appellate court, it was presumed that the trial court properly fixed the punishment on a conviction for attempt to commit burglary. *State v. Mish*, 36 M 168, 175, 92 P 459.

Since court could have sentenced defendant, if guilty of the infamous crime against nature, to term of thirty years, it could fix one-half that term upon conviction for attempt. *State v. Stone*, 40 M 88, 92, 105 P 89.

## CHAPTER 5

## OFFENSES AGAINST THE PERSON

**Part One. Homicide**

- Section 94-5-101. Criminal homicide.  
 94-5-102. Deliberate homicide.  
 94-5-103. Mitigated deliberate homicide.  
 94-5-104. Negligent homicide.  
 94-5-106. Aiding or soliciting suicide.

**Part Two. Assault**

- 94-5-201. Assault.  
 94-5-202. Aggravated assault.  
 94-5-203. Intimidation.

**Part Three. Kidnapping**

- 94-5-301. Unlawful restraint.  
 94-5-302. Kidnapping.  
 94-5-303. Aggravated kidnapping.  
 94-5-305. Custodial interference.

**Part Four. Robbery**

- 94-5-401. Robbery.

**Part Five. Sexual Crimes**

- 94-5-501. Definitions.  
 94-5-502. Sexual assault.  
 94-5-503. Sexual intercourse without consent.  
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**Part Six. Offenses Against the Family**

- 94-5-602. Prostitution.  
 94-5-603. Promoting prostitution.  
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 94-5-605. Marrying a bigamist.  
 94-5-606. Incest.  
 94-5-607. Endangering the welfare of children.  
 94-5-608. Nonsupport.  
 94-5-609. Unlawful transactions with children.  
 94-5-610. Unlawful possession of intoxicating substance by children.  
 94-5-613. Short title.  
 94-5-614. Statement of purpose.



- 94-5-615. Definitions.
- 94-5-616. Consent to abortion.
- 94-5-617. Protection of life and health of infant.
- 94-5-618. Control of practice of abortion.
- 94-5-619. Reporting of practice of abortion.
- 94-5-620. Refusal to participate in abortion.
- 94-5-621. Other regulations.
- 94-5-622. Penalties.
- 94-5-623. Legislative intent.
- 94-5-624. Severability.

## Part One

### Homicide

**94-5-101. Criminal homicide.** (1) A person commits the offense of criminal homicide if he purposely, knowingly or negligently causes the death of another human being.

(2) Criminal homicide is deliberate homicide, mitigated deliberate homicide, or negligent homicide.

**History:** En. 94-5-101 by Sec. 1, Ch. 513, L. 1973.

**Source:** Substantially the same as the Model Penal Code, section 210.1.

#### Commission Comment

The criminal homicide section represents a complete departure from the old law, and the traditionally difficult concept of "malice aforethought." In an effort to eliminate this unsatisfactory terminology, the varying degrees of criminal homicide are differentiated by use of terms "deliberate homicide," "mitigated deliberate homicide" and "negligent homicide." This serves two purposes. First, these terms are more descriptive of the conduct proscribed. Second, judges, jurors and attorneys will not be misled as to the weight of prior law construing instructions on murder, manslaughter, etc.

The language used attempts to isolate the character of the offender's conduct and to differentiate the offenses according to the differing elements of that conduct. It is clear, for example, that causing death

purposely, knowingly or negligently must, in the absence of justification, establish criminality. The section also purposes the abandonment of the traditional distinction between first and second-degree murder, deriving from the Pennsylvania reform of 1794, under which the determinants of capital or potentially capital murder are deliberate and premeditated purpose to kill, or specific felony-murders. The section in this regard includes the following features: (1) the exclusion from the capital class of certain murders where a clear ground of mitigation is established; (2) a specification of aggravating circumstances, at least one of which must be established before a capital sentence is possible; (3) a final determination by the court as to the existence of mitigating circumstances.

There is no requirement that death must occur within any stated period of time. Time will be limited only by the need to prove a causal relation between conduct and the resulting death. (See section 94-2-105.)

### DECISIONS UNDER FORMER LAW

#### Cause of Death

Instruction to jury which permitted conviction of involuntary manslaughter based on drunken driving without a finding that defendant's intoxication was a proximate cause of the death was improper and reversible error. *State v. Darchuck*, 117 M 15, 156 P 2d 173.

If defendant's wrongful conduct hastens death or extinguishes whatever chance the victim had to survive, defendant may be convicted of homicide even though the victim might not have survived even if de-

fendant had acted properly. *State v. Mally*, 139 M 599, 366 P 2d 868.

#### Circumstantial Evidence

Tentative identification of defendants as having committed robbery near the scene of a homicide, evidence that the homicide occurred in the course of a robbery, finding of the fatal weapon in possession of a defendant, and fact that defendants were fleeing the scene, were sufficient to support verdict of guilty of murder in the course of a robbery. *State v. Miller*, 91 M 596, 9 P 2d 474.

**Instructions on Degrees of Murder**

Trial court properly instructed jury on second degree murder where homicide occurred after an alleged rape had been committed as a result of victim's threats to expose defendant's acts; court properly refused instruction that acts committed would justify verdict of either first degree murder or acquittal. *State v. Perry*, — M —, 505 P 2d 113.

**Time of Death**

Under former section 94-2509, it was not necessary to allege in an information for murder the date upon which the death occurred as distinguished from the date of assault. All that was necessary in order to constitute the crime of murder, the other requisite facts being proven, was that the death of the party occurred within a year and a day after the stroke received or the cause of death administered. *State v. Powers*, 39 M 259, 102 P 583.

**94-5-102. Deliberate homicide.** (1) Except as provided in 94-5-103(1) (a), criminal homicide constitutes deliberate homicide if:

- (a) it is committed purposely or knowingly; or
- (b) it is committed while the offender is engaged in or is an accomplice in the commission of, an attempt to commit, or flight after committing or attempting to commit robbery, sexual intercourse without consent, arson, burglary, kidnapping, felonious escape, or any other felony which involves the use or threat of physical force or violence against any individual.

(2) A person convicted of the offense of deliberate homicide shall be punished by death or life imprisonment as provided in 95-2206.6 through 95-2206.15 or by imprisonment in the state prison for a term of not less than 2 years or more than 100 years, except as provided in 95-2206.18.

**History:** En. 94-5-102 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 11, Ch. 338, L. 1977; amd. Sec. 4, Ch. 584, L. 1977.

**Source:** New.

**Amendments**

Chapter 338, Laws of 1977, substituted "death or life imprisonment as provided in 95-2206.6 through 95-2206.15" in subsection (2) for "death as provided in section 94-5-105" and made minor changes in phraseology, punctuation and style.

Chapter 584, Laws of 1977, substituted "for a term of not less than 2 years or more than 100 years, except as provided in 95-2206.18" at the end of subsection (2) for "for any term not to exceed one hundred (100) years."

**Constitutionality**

Because it permits imposition of the death penalty only for a narrowly defined class of murders and kidnappings and permits the sentencing judge to consider mitigating circumstances before imposition of sentence, and because any case in which the death penalty is imposed is appealable to the supreme court or the sentence review division (section 95-2501 et seq.), this section is constitutional under the standards of *Jurek v. Texas*, — US —, 96 S Ct 2950, 49 L Ed 2d 929. *State v. McKenzie*, — M —, 557 P 2d 1023.

**Felony Murder**

Where defendant committed a robbery immediately after being involved with another in the beating death of the owner of the establishment robbed, but no causal

**Commission Comment**

Section 94-5-102 relates only to conduct which is done deliberately; that is, purposely or knowingly. The enumerated offenses in subsection (b) broaden the old law dealing with felony-murders, R. C. M. 1947, section 94-2503, to include any felony which involves force or violence against an individual. Since such offenses are usually coincident with an extremely high homicidal risk, a homicide which occurs during their commission can be considered a deliberate homicide. The section is intended to encompass most homicides traditionally designated as second-degree murder. Subsection (2) changes the punishment, providing that a person "shall be punished by death . . . or by imprisonment . . . for any term not to exceed one hundred (100) years," thus seeking to expand the sentencing latitude of the judge.

**Compiler's Notes**

This section was amended twice in 1977, once by Ch. 338 and once by Ch. 584. Since the amendments do not appear to conflict, the Code Commissioner has made a composite section embodying the changes made by both amendments.



connection between the homicide and the robbery was shown, the felony-murder rule did not apply. *State ex rel. Murphy v. McKinnon*, — M —, 556 P 2d 906.

### Information

In an information charging homicide, it is unnecessary to allege the means of producing death or the related felony, but merely whether it was committed purposely and knowingly, or committed while the defendant was engaged in commission of a felony. *State ex rel. McKenzie v. District Court of Ninth Judicial Dist.*, — M —, 525 P 2d 1211.

Affidavit in support of motion for leave to file information direct which alleged only that defendant had entered a bar with a companion, that the companion had beaten the bar owner to death, that during such beating defendant had failed to restrain his companion, and that defendant had at least once said to the victim that "he had this coming," was insufficient to establish probable cause to believe that defendant had committed deliberate homicide, and leave to file the information should not have been granted. *State ex rel. Murphy v. McKinnon*, — M —, 556 P 2d 906.

## DECISIONS UNDER FORMER LAW

### Burden of Proof

Under former section 94-2503, to sustain a conviction of murder in the first degree, it was incumbent upon the state to show by the record not only that it discharged the burden resting upon it to establish the killing by defendant, but also that it proved deliberation and premeditation on his part. *State v. Gunn*, 85 M 553, 555, 281 P 757.

### Degrees of Murder

Murder committed in the perpetration or attempt to perpetrate robbery, burglary, etc., was murder of the first degree under former section 94-2503 and murder so committed is not divisible into degrees; the court need not have instructed as to murder of the second degree or manslaughter. *State v. Reagan*, 64 M 481, 210 P 86; *State v. Bolton*, 65 M 74, 212 P 504.

As a general rule the district court, in a trial for homicide, need not have given an instruction on second degree murder where the killing was charged to have been perpetrated in the commission of one of the felonies enumerated in former section 94-2503, or where there was no evidence tending to show a lesser offense than murder in the first degree. *State v. Le Duc*, 89 M 545, 300 P 919.

The trial court did not err in giving an instruction on murder in the second degree under former section 94-2503, as against the contention of defendant that under his plea of self-defense he was either guilty of murder in the first degree or not guilty. *State v. Le Duc*, 89 M 545, 300 P 919.

Where the evidence in a prosecution for homicide under former section 94-2503 disclosed that the crime was committed during a robbery or an attempt to commit it, or failed to show that fact beyond a reasonable doubt, the only permissible verdict, under that section, on the one hand, was one of murder in the first degree, or, on the other, of acquittal, and

under such conditions the court was not required to instruct on murder in the second degree; the rule was the same where the state relied on circumstantial evidence for conviction. *State v. Miller*, 91 M 596, 9 P 2d 474.

In murder prosecution under former section 94-2503, jury was properly instructed that if it found that killing was unlawfully done by defendant with deliberation, premeditation and malice aforethought, defendant was guilty of murder in first degree but if it believed that killing was unlawfully done with malice aforethought, although not deliberate and premeditated, or that defendant was incapable of premeditation and deliberation because of intoxication at time of killing, then crime was second degree murder. *State v. Brooks*, 150 M 399, 436 P 2d 91.

### Deliberation and Premeditation

Where, under all the circumstances, it appeared unlikely that the defendant sought out the decedent to continue a previous affray but more likely that he accidentally came upon the decedent's party, verdict of guilty of first degree murder could not be upheld and the judgment was reduced to second degree. *State v. Gunn*, 89 M 453, 300 P 212.

Under former section 94-2503, after the state had made proof of the homicide charged the crime was presumed to be murder in the second degree and the burden then rested upon the state to introduce evidence satisfying the jury beyond a reasonable doubt that there was deliberation and premeditation to raise the crime to murder in the first degree. *State v. Le Duc*, 89 M 545, 300 P 919.

Where defendant was convicted of murder in the second degree under former section 94-2503, he was not prejudiced by an instruction that the deliberation and premeditation necessary to raise the crime to murder in the first degree could be formed in an instant, even though the instruction



was erroneous. *State v. Le Duc*, 89 M 545, 300 P 919.

### Failure to Provide

Under former section 94-2501, an information charging a husband with a willful failure to provide for his wife and to protect her from the cold and inclement weather, as a result of which she died, sustained a conviction for murder in the second degree. *Territory v. Manton*, 7 M 162, 168, 14 P 637.

### Felony Murder

Under former section 94-2503, homicide committed in the perpetration of or an attempt to perpetrate robbery was murder in the first degree, regardless of the absence of intent to commit the latter crime; the capability of entertaining the felonious intent to commit robbery was sufficient. *State v. Reagin*, 64 M 481, 210 P 86.

Evidence showing homicide in the course of a robbery could be introduced under an information charging willful, deliberate, unlawful, felonious and premeditated killing with malice aforethought. *State v. Bolton*, 65 M 74, 212 P 504.

Killing of a pursuer by bank robbers after a thirty-mile continuous and uninterrupted pursuit was first-degree murder within the felony-murder rule. *State v. Jackson*, 71 M 421, 230 P 370.

All who participated in a robbery, or an attempted robbery, during which a homicide was committed, were guilty of murder in the first degree under former section 94-2503, irrespective of which one of the participants fired the fatal shot. *State v. Miller*, 91 M 596, 9 P 2d 474.

Where all of the circumstances indicated homicide in the course of a robbery and the only real question was identification, request to instruct on lesser and included offenses was properly refused. *State v. Miller*, 91 M 596, 9 P 2d 474.

Evidence in a prosecution for murder at nighttime in the perpetration of burglary, supported by a full confession by defendant, was sufficient to warrant the extreme penalty under former section 94-2503. *State v. Zorn*, 99 M 63, 41 P 2d 513.

Defendant who hired two men to set fire and burn his service station, during the course of which the two men were burned and subsequently died, was guilty of first degree murder under the felony-murder rule since any death directly attributable to a plot to commit arson made all the conspirators in the arson plot equally guilty of first degree murder. *State v. Morran*, 131 M 17, 306 P 2d 679.

Under former section 94-2503, an information reciting commission of robbery and alleging that in perpetration of robbery, defendant killed deceased, charged murder in first degree rather than two separate

and distinct crimes of robbery and premeditated murder. In re *Petition of Dixon*, 149 M 412, 430 P 2d 642, cert. den. 390 US 907, 88 S Ct 824.

Under the felony-murder rule in former section 94-2503, both parties were guilty of murder in first degree where evidence clearly showed that both had kidnaped and robbed victim but did not clearly show which of two had shot and killed victim. *State v. Corliss*, 150 M 40, 430 P 2d 632, cert. den. 390 US 961, 88 S Ct 1063.

### Indictment

An indictment for murder good at common law was good under former section 94-2501. *Territory of Montana v. Stears*, 2 M 324; *Territory of Montana v. Young*, 5 M 242, 5 P 248; *State v. Lu Sing*, 34 M 31, 85 P 521; *State v. McGowan*, 36 M 422, 93 P 552.

Under former section 94-2501, in an information for murder, it was sufficient to allege that the killing was with malice aforethought; the elements of premeditation and deliberation were matters of proof. *Territory of Montana v. Stears*, 2 M 324; *Territory of Montana v. McAndrews*, 3 M 158; *State v. Metcalf*, 17 M 417, 43 P 182; *State v. Lu Sing*, 34 M 31, 85 P 521; *State v. Hayes*, 38 M 219, 99 P 434; *State v. Nielson*, 38 M 451, 100 P 229. See also *State v. Guerin*, 51 M 250, 152 P 747.

Under former section 94-2501, an information charging that accused committed a murder willfully, unlawfully, feloniously, and premeditatedly, and of his malice aforethought, charged murder in the first degree, even though it failed to use the word "deliberately." *State v. Hliboka*, 31 M 455, 457, 78 P 965.

It was not necessary under former section 94-2503, to allege that the acts of the accused were done deliberately to sustain a conviction of murder of the first degree, and allegations sufficient for a common-law indictment were sufficient for an information. *State v. Lu Sing*, 34 M 31, 85 P 521. See also *State v. McGowan*, 36 M 422, 93 P 552; *State v. Wolf*, 56 M 493, 185 P 556, distinguished in 142 M 459, 461, 384 P 2d 749.

Under former section 94-2501 an information stating that the defendant unlawfully, feloniously, willfully, premeditatedly, deliberately, and with malice aforethought, shot and killed a person named, a human being, sufficiently charged murder. *State v. Crean*, 43 M 47, 63, 114 P 603.

### Instructions to Jury

In a prosecution for murder in the first degree under former section 94-2503, appellant could not complain of the failure of the court to instruct on the subjects of manslaughter or murder of the

second degree in the absence of an offer by him of instructions on those subjects. *State v. Reagin*, 64 M 481, 210 P 86.

In prosecutions for first degree murder, trial court did not err in refusing defendant's proposed instructions in the language of the section on proof of corpus delicti where the matter of proof beyond a reasonable doubt was included in another instruction. *State v. Quigg*, 155 M 119, 467 P 2d 692.

In prosecution for murder, trial court erred by giving instruction describing state's burden as "only that degree of proof," and proof beyond a reasonable doubt as "only such proof as may be" since the inclusion of the word "only" could tend to confuse a jury composed of laymen and in effect dilute the degree of guilt and proof the state is bound to establish. *State v. Taylor*, — M —, 515 P 2d 695.

#### Lesser Included Offense

Under former section 94-2503, where defendant was charged with murder in the second degree it was permissible for the jury to find him guilty of involuntary manslaughter. *State v. Allison*, 122 M 120, 199 P 2d 279, 288.

#### Lying in Wait

Where defendant had robbed a bank and in the course of his escape drove his

automobile into a coulee, stopped his machine and shortly thereafter shot and killed one of his pursuers when he appeared on the top of a hill, an instruction that homicide committed by lying in wait constituted murder in the first degree under former section 94-2503 was proper. *State v. Jackson*, 71 M 421, 230 P 370.

#### Malice Aforethought

Under former section 94-2501, the distinction between murder and manslaughter was that the element of malice aforethought entered into the former, while it was wanting in the latter. *State v. Sloan*, 22 M 293, 56 P 364.

Sufficient malice aforethought to support conviction of second degree murder was shown by defendant's firing of weapon at combatants, even though there was no specific intent to kill and even though the one killed was the one defendant sought to protect. *State v. Chavez*, 85 M 544, 281 P 352.

#### Sentence for Second-Degree Murder

Second-degree murder sentence of forty years in state prison imposed by trial judge under former section 94-2505 was not unduly harsh and unreasonable even when jury first attempted to return a verdict of ten years without parole. *State v. Brooks*, 150 M 399, 436 P 2d 91.

**94-5-103. Mitigated deliberate homicide.** (1) Criminal homicide constitutes mitigated deliberate homicide when a homicide which would otherwise be deliberate homicide is committed under the influence of extreme mental or emotional stress for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a reasonable person in the actor's situation.

(2) A person convicted of mitigated deliberate homicide shall be imprisoned in the state prison for a term of not less than 2 years or more than 40 years, except as provided in 95-2206.18.

**History:** En. 94-5-103 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 5, Ch. 584, L. 1977.

**Source:** New.

#### Commission Comment

Section 94-5-103 specifies the circumstances under which the punishment for deliberate homicide is mitigated.

#### Amendments

The 1977 amendment substituted "a term of not less than 2 years or more than 40 years, except as provided in 95-2206.18" in subsection (2) for "any term not to exceed forty (40) years."

#### DECISIONS UNDER FORMER LAW

##### Election of Charge

Trial court committed reversible error in failing to admonish jury to disregard testimony introduced to show evidence of intent in order to prove crime of voluntary manslaughter when, at end of defendant's case, trial court granted a motion requiring state to elect between charge

of voluntary and involuntary manslaughter and the state elected to specify the charge as involuntary manslaughter; evidence admitted for purpose of proving intent was irrelevant to charge of involuntary manslaughter. *State v. Newman*, — M —, 513 P 2d 258.



### Instructions

Where there was evidence showing defendant to be guilty of either murder of the first or second degree or manslaughter, the court had to give explicit instructions to the jury that a verdict of manslaughter as described by former section 94-2507 could be returned, under the rule that where the evidence warrants it, instructions must be given upon every offense included in the crime charged. *State v. Mumford*, 69 M 424, 222 P 447.

Where judge instructed the jury in the language of former section 94-2507, thereby giving the jury the definitions of both voluntary and involuntary manslaughter, defendant could not complain on ground there was no evidence of voluntary manslaughter where the jury found him guilty of involuntary manslaughter. *State v. Allison*, 122 M 120, 199 P 2d 279.

Instruction that jury must have found beyond a reasonable doubt that the action of the "defendant contributed to or was the proximate cause of the death" of the decedent was an incorrect statement of law since the use of the word "or" could have been understood to have meant that the actions of the defendant need not have proximately caused the death but only contributed to it. *State v. Newman*, — M —, 513 P 2d 258.

Instruction reading in part "if you find . . . that the deceased . . . was laboring under the effects of a poor physical condition, or had an alcoholic problem, to such a degree that in all probability these factors would have ultimately shortened her life, and if you further find the defendant inflicted a blow or blows upon the deceased which hastened or accelerated her death . . . this is sufficient to constitute the crime of involuntary manslaughter as previously defined in these instructions," was defective as a comment on the evidence and because the

instruction could be understood to mean that the actions of the defendant need not have proximately caused the death of decedent but only contributed to it. *State v. Newman*, — M —, 513 P 2d 258.

Stepfather charged with murder in alleged beating death of his stepchild was entitled to instructions on voluntary and involuntary manslaughter in view of testimony that his striking the child was for disciplinary purposes and that he never intended to hurt her. *State v. Taylor*, — M —, 515 P 2d 695.

### Intoxication

In murder prosecution, jury was properly instructed that if killing was unlawfully done by defendant without malice or if he was so intoxicated at time of killing that he was incapable of harboring malice aforethought, crime was manslaughter as described by former section 94-2507. *State v. Brooks*, 150 M 399, 436 P 2d 91.

### Sudden Quarrel

Former section 94-2507 was a recognition of the frailty of human nature, and had as its purpose the reduction of a homicide committed under the circumstances therein contemplated to the grade of manslaughter. *State v. Messerly*, 126 M 62, 244 P 2d 1054.

### Sufficiency of Evidence

Evidence that defendant was wearing a peculiar sweatshirt which was later found wet and bloody near the scene of the murder along with a paring knife and a pair of wet and bloody trousers with the pockets ripped out, one of which pockets was later discovered and identified as part of the trousers belonging to defendant, was sufficient to sustain conviction of second degree murder. *State v. Fitzpatrick*, — M —, 516 P 2d 605.

**94-5-104. Negligent homicide.** (1) Criminal homicide constitutes negligent homicide when it is committed negligently.

(2) A person convicted of negligent homicide shall be imprisoned in the state prison for any term not to exceed ten (10) years.

**History:** En. 94-5-104 by Sec. 1, Ch. 513, L. 1973.

**Source:** Substantially the same as Model Penal Code, section 210.4.

### Commission Comment

Section 94-5-104 is addressed to homicides caused by negligence as defined in section 94-2-101(32). The negligence applicable to criminal homicide requires that the homicidal risk be of such a nature and degree that to disregard it involves a "gross deviation" from the standard of

conduct that a reasonable person would observe in the actor's situation.

This code provision is especially relevant to vehicular homicides, since it is inevitable that they will predominate in number. In this country, however, it has been very difficult to convict the negligent motorist of a criminal homicide. Several states have attempted with varying success to deal with the problem by enacting special legislation, but such legislation should not be necessary in Montana with proper application of this provision. Clear-



ly, if the evidence does not make out a case of negligence, as negligence is herein defined, there is no reason for creating criminal liability for homicide, as distinguished from any other traffic offense.

However, because of the diverse facts surrounding negligent homicides the sentencing judge is given freedom to sentence the act either as a misdemeanor or a felony. See section 94-1-105.

#### DECISIONS UNDER FORMER LAW

##### Degree of Negligence

The negligent handling of a loaded firearm causing or contributing to the death of another person, could be found to support of conviction of involuntary manslaughter within the meaning of subdivision 2 of former section 94-2507. *State v. Kuum*, 55 M 436, 178 P 288.

Conviction of involuntary manslaughter in the commission of a lawful act under former section 94-2507 required a higher degree of negligence than to establish liability in a civil case; it required aggravated, culpable or gross negligence, or recklessness, a disregard for human life or an indifference to consequences, such a departure from the conduct of an ordinarily prudent or careful man under the circumstances as to be incompatible with a proper regard for human life. *State v. Powell*, 114 M 571, 138 P 2d 949.

Evidence in a manslaughter prosecution showing that defendant driver, blinded by bright lights of an approaching car, drove off the highway into a shallow depression filled with a pile of rocks hidden by brush, causing the car to sideswipe a tree, was insufficient to sustain conviction on theory of criminal negligence. *State v. Bast*, 116 M 329, 337, 151 P 2d 1009.

Where the court instructed the jury that in order to find the defendant guilty of manslaughter under former section 94-2507, it must find that the defendant committed an unlawful act, not amounting to a felony, and that the unlawful act was the proximate cause of the injury and death; and then in a later instruction defined criminal negligence as such that amounts to a wanton, flagrant, or reckless disregard of consequences or willful indifference of the safety or rights of others, the instructions taken as a whole are correct. For while the former may, standing alone, be inaccurate or even erroneous, yet as qualified and explained by other portions of the charge, in *pari materia*, it fully and fairly submitted the case to the jury. *State v. Boshel*, 125 M 566, 242 P 2d 477.

Instruction permitting conviction on findings that defendant was on wrong side of road and that decedent in no way contributed to the accident was reversible error in that it did not require union of act and criminal negligence and there was no instruction to consider the instructions as a whole. *State v. Strobel*, 130 M 442,

304 P 2d 606, explained in 134 M 519, 525, 333 P 2d 1017, 1021.

Defendant who deliberately drove his car around curve at a speed which he must have known was dangerous to the lives of himself and his passengers was properly convicted of involuntary manslaughter under former section 94-2507. *State v. Pankow*, 134 M 519, 333 P 2d 1017, 1019.

Lack of due caution or circumspection as required by former section 94-2507, in lawfully correcting child could be found from doctor's testimony that basal skull fracture and fatal liver transection required severe and extensive force. *State v. Henrich*, 159 M 365, 498 P 2d 124.

##### Double Jeopardy

Prosecution for involuntary manslaughter under former section 94-2507 was not barred by defendant's prior conviction upon guilty pleas to driving while intoxicated and operating motor vehicle with improper brakes arising from same accident. *State v. McDonald*, 158 M 307, 491 P 2d 711.

##### Failure to Provide

Failure of parents to provide food for baby, with resulting death from starvation, the baby weighing only ten ounces more at five months than at birth, was such culpable negligence as to show a disregard for human life or an indifference to consequences, and would support a conviction for involuntary manslaughter even without an intention to cause death. *State v. Bischoff*, 131 M 152, 308 P 2d 969.

Husband's failure to provide medical attention for wife for two days after she fell and sustained serious injuries was such culpable negligence as to support conviction for involuntary manslaughter, even though wife protested that she did not need attention, where she was in semicomatose condition and obviously did need attention. *State v. Mally*, 139 M 599, 366 P 2d 868.

In prosecution for involuntary manslaughter based on failure to provide medical attention, the state had no duty to prove that defendant could pay for medical attention and it was a matter of defense to show that defendant could neither pay for attention nor obtain it under the poor relief laws. *State v. Mally*, 139 M 599, 366 P 2d 868.

Where wife died from subdural hematoma after a period of unconsciousness, husband's failure to summon medical assistance for period of twenty-eight hours was not such degree of culpable negligence as to support a conviction of involuntary manslaughter under former section 94-2507 where unconsciousness appeared to have been from intoxication, wife appeared to be breathing well, and friend advised only bed rest. *State v. Decker*, 157 M 361, 485 P 2d 695.

#### Indictment and Information

An information charging that defendant "did willfully, unlawfully, knowingly and feloniously kill one B., a human being, contrary to the form" etc., was sufficient to charge manslaughter under former section 94-2507, even though it did not specify whether the crime had been either voluntarily or involuntarily committed. *State v. Gondeiro*, 82 M 530, 268 P 507, overruled on other grounds in *State v. Bosch*, 125 M 566, 242 P 2d 477.

#### Instructions to Jury

Defendant could not complain of jury instruction in the language of former section 94-2507, including the definitions of both voluntary and involuntary manslaughter, on ground there was no evidence of voluntary manslaughter, where the jury found him guilty only of involuntary manslaughter. *State v. Allison*, 122 M 120, 199 P 2d 279.

When court withdrew murder charge and submitted case to jury on question of manslaughter, it should have modified its instruction on intent to cover intent required for manslaughter, but failure to do so was not prejudicial to defendant convicted only of involuntary manslaughter.

### 94-5-105. Repealed.

#### Repeal

Section 94-5-105 (Sec. 1, Ch. 513, L. 1973; Sec. 1, Ch. 262, L. 1974; Sec. 14, Ch.

*State v. Allison*, 122 M 120, 199 P 2d 279.

#### Intent

In prosecution for involuntary manslaughter under former section 94-2507 the issue was one of criminal negligence rather than intent, and instruction that "intent is not an element of involuntary manslaughter" was proper. *State v. Souhrada*, 122 M 377, 204 P 2d 792.

Willful or evil intent was not an element of involuntary manslaughter under former section 94-2507. *State v. Souhrada*, 122 M 377, 204 P 2d 792; *State v. Messerly*, 126 M 62, 244 P 2d 1054; *State v. Pankow*, 134 M 519, 333 P 2d 1017.

In murder prosecution, jury was properly instructed that if killing was unlawfully done by defendant without malice or if he was so intoxicated at the time of killing that he was incapable of harboring malice aforethought, crime was manslaughter as described by former section 94-2507. *State v. Brooks*, 150 M 399, 436 P 2d 91.

#### Juvenile Defendant

Driving while intoxicated was an unlawful act within the meaning of former section 94-2507 even though, because defendant was a juvenile, he could have been prosecuted only under the Juvenile Act. *State v. Medicine Bull*, 152 M 34, 445 P 2d 916.

#### Lesser Included Offense

Where defendant was charged with murder in the second degree it was permissible for the jury to find him guilty of involuntary manslaughter under former section 94-2507. *State v. Allison*, 122 M 120, 199 P 2d 279.

359, L. 1977), relating to death sentence for deliberate homicide, was repealed by Sec. 16, Ch. 338, Laws 1977.

**94-5-106. Aiding or soliciting suicide.** (1) A person who purposely aids or solicits another to commit suicide, but such suicide does not occur commits the offense of aiding or soliciting suicide.

(2) A person convicted of the offense of aiding or soliciting a suicide shall be imprisoned in the state prison for any term not to exceed ten (10) years.

**History:** En. 94-5-106 by Sec. 1, Ch. 513, L. 1973.

**Source:** New.

#### Commission Comment

If the conduct of the offender made him the agent of the death, the offense is

criminal homicide notwithstanding the consent or even the solicitations of the victim. See sections 94-5-101 through 94-5-105.

Rather than relying on aiding or soliciting an attempted homicide, this section sets forth the specific formula to make



such acts punishable. The rationale behind the felony sentence for the substantive offense of aiding or soliciting suicide is

that the act typifies a very low and dangerous regard for human life.

## Part Two

### Assault

**94-5-201. Assault.** (1) A person commits the offense of assault if he:

- (a) purposely or knowingly causes bodily injury to another; or
- (b) negligently causes bodily injury to another with a weapon; or
- (c) purposely or knowingly makes physical contact of an insulting or provoking nature with any individual; or
- (d) purposely or knowingly causes reasonable apprehension of bodily injury in another. The purpose to cause reasonable apprehension or the knowledge that reasonable apprehension would be caused shall be presumed in any case in which a person knowingly points a firearm at or in the direction of another whether or not the offender believes the firearm to be loaded.

(2) A person convicted of assault shall be fined not to exceed five hundred dollars (\$500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both.

**History:** En. 94-5-201 by Sec. 1, Ch. 513, L. 1973.

**Source:** Substantially the same as Model Penal Code, section 211.1.

#### Commission Comment

This section codifies what is generally known as "simple assault." The section makes several changes in the old assault law. The primary change is that it sets forth the elements of the offense of assault specifically rather than assigning to the offense conduct not covered by other more serious assault provisions. Another change is that the offense must be com-

mitted purposely, knowingly or negligently, thus maintaining the intent element consistent with the other proposed statutes dealing with offenses against the person. It should be noted that "battery," i.e., actual bodily injury or contact of some kind, is an essential element of the offense of assault in all instances except those arising under subdivision (1)(d). The type of apprehension required as an element of the offense under subdivision (1)(d) is apprehension of bodily injury, and not apprehension of mere physical contact. (See section 94-2-101 (54), bodily injury.)

### DECISIONS UNDER FORMER LAW

#### Instructions

Instructioning jury on assault by willfully inflicting grievous bodily harm when defendant had been charged with assault with intent to prevent or resist his lawful detention or apprehension was harmless error where the evidence conclusively demonstrated defendant's guilt of the offense charged. *State v. Jones*, — M —, 505 P 2d 97.

#### Instructions to Jury

Where the only evidence of assault was by pointing a firearm, defendant was guilty of assault in the second degree under former section 94-602 or not guilty at all, so that it was error to give an instruction on the law applicable to assault

in the third degree as defined in former section 94-603. *State v. Karri*, 84 M 130, 276 P 427.

It was error to refuse defendant's instructions defining assault in the third degree under former section 94-603, and instead to instruct the jury as to assault in the first and second degree under former sections 94-601 and 94-602 respectively, but omitting any instructions defining what felony was intended to be committed by assaulting a person with a gun. Since the jury had no way of knowing what felony, if any, the defendant intended to commit upon a person by pointing a gun at him, the jury should have been allowed to consider whether or not defendant was guilty of third



degree assault. *State v. Quinlan*, 126 M 52, 244 P 2d 1053, overruled on other grounds in 158 M 102, 111, 489 P 2d 99.

#### Intent

A verdict finding a defendant guilty of an assault with corrosive acids and caustic

chemicals, which failed to find that the assault was committed willfully or maliciously, or with intent to injure, was a verdict of guilty of assault in the third degree under former section 94-603. *State v. District Court*, 35 M 321, 324, 89 P 63.

**94-5-202. Aggravated assault.** (1) A person commits the offense of aggravated assault if he purposely or knowingly causes:

- (a) serious bodily injury to another;
- (b) bodily injury to another with a weapon;
- (c) reasonable apprehension of serious bodily injury in another by use of a weapon; or
- (d) bodily injury to a peace officer.

(2) A person convicted of aggravated assault shall be imprisoned in the state prison for a term of not less than 2 years or more than 20 years, except as provided in 95-2206.18.

**History:** En. 94-5-202 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 6, Ch. 584, L. 1977.

**Source:** Substantially the same as Model Penal Code, section 211.1(2).

#### Commission Comment

This section covers assaults committed under circumstances of aggravation. The elements of assault generally must be present in addition to the aggravating factor of causing serious bodily injury (See section 94-2-101(54) with purpose or knowledge. It should be noted that the crime of battery is merged within the assault provision by direct reference to physical contact, bodily injury and serious bodily injury in section 94-5-201(a) and (b) and (c) and section 94-5-202(a) and (b). Classical assault in a tort sense is included in sections 94-5-201(d) and 94-5-202(c).

#### Amendments

The 1977 amendment substituted "a term of not less than 2 years or more than 20 years, except as provided in 95-2206.18" in subsection (2) for "any term not to exceed twenty (20) years"; and made minor changes in phraseology.

#### Sentence

Where defendant was convicted under this section of beating his two-year-old foster child, the trial court did not abuse

its discretion in sentencing him to fifteen years imprisonment, even though a psychiatrist testified that defendant was suffering from a treatable neurosis at the time of the beating, had undergone treatment and was no longer a threat to anyone, and even though the court had relied on information concerning the victim's condition which was later contested in defendant's petition to the sentence review division. *State v. Mann*, — M —, 546 P 2d 515.

#### "Substantial Risk of Death"

The question of whether the victim of an offense under this section incurred a "substantial risk of death" as a result of his injuries is one of fact to be determined by the jury and does not depend on whether he ultimately lives or dies. *State v. Fuger*, — M —, 554 P 2d 1338.

#### Weapons Used

Multiple counts of aggravated assault under subdivision (1)(b), specifying various probable weapons, are unnecessary to inform the defendant of the charges against him since an information of aggravated assault naming weapons in the alternative fulfills the notice requirements. *State ex rel. McKenzie v. District Court of Ninth Judicial Dist.*, — M —, 525 P 2d 1211.

### DECISIONS UNDER FORMER LAW

#### Grievous Bodily Harm

Instruction defining term "grievous bodily harm" as used in subdivision 3 of former section 94-602 to include any injury calculated to interfere with the health or comfort of the person injured, and that the word "grievous" means atrocious, aggravated, harmful, painful, hard

to bear and serious in nature, was proper. *State v. Laughlin*, 105 M 490, 73 P 2d 718.

#### Instructions to Jury

Defendant charged with second degree assault under former section 94-602 but convicted only of third degree assault

under former section 94-603 was not prejudiced by jury instruction comprising all the subdivisions of section 94-602. *State v. Farnham*, 35 M 375, 89 P 728.

#### Intent

It was not necessary to allege, in an information for an assault and battery in the second degree, as defined in subdivision 3 of former section 94-602, that "the assault was committed with the intent to inflict grievous bodily harm," be- word "intent" in defining the crime. *State* cause the statute did not include the *v. Broadbent*, 19 M 467, 48 P 775. See also *State v. Bloor*, 20 M 574, 52 P 611; *State ex rel. Webb v. District Court*, 37 M 191, 95 P 593.

In cases of assault of the first degree under former section 94-601 where the specific charge in the information was "assault with intent to kill," the instruction should have omitted all reference to murder or manslaughter, and advised jurors, in lieu thereof, that, to sustain the information, they must find, beyond a reasonable doubt, that the assault was committed with intent to kill. *State v. Schaefer*, 35 M 217, 88 P 792, distinguished in 135 M 139, 147, 337 P 2d 924.

Evidence was insufficient to justify a conviction of second degree assault with a deadly weapon under former section 94-602 where it was disclosed that the defendant was hunting jack rabbits at the time; that he never knew the prosecuting witness prior to the day of the alleged assault; that the rifle was extremely sensitive and would fire upon being brushed against an object such as clothing or even a change in temperature might fire the gun; and that the defendant was an instructor in firearms in the army during the war and would not have missed from the distance of eight feet had he been aiming at the prosecuting witness. *State v. Smith*, 126 M 124, 246 P 2d 227.

In prosecutions for first degree assault under former section 94-601, the element of felonious intent had to be determined from the facts and circumstances of the particular case; criminal intent is rarely susceptible of direct or positive proof and therefore must usually be inferred from the facts testified to by witnesses and the circumstances as developed by the evidence. *State v. Madden*, 128 M 408, 276 P 2d 974.

Proof of specific intent was necessary in second degree assault charges only under subdivisions 1, 2 and 5 of former section 94-602. *State v. Straight*, 136 M 255, 347 P 2d 482.

That defendant was able to form specific intent to commit first degree as-

sault under former section 94-601 was properly inferred from evidence that, although intoxicated, defendant turned off lights inside apartment, reached into nearby drawer and prepared revolver for action, surrendered to police, walked out of apartment under own power with hands in air and after arrest had no difficulty in recounting recent events to police. *State v. Lukus*, 149 M 45, 423 P 2d 49.

Refusal to instruct that in every crime there must exist union or joint operation of act and intent or criminal negligence as provided by statute was not error in prosecution for second degree assault as defined in subdivision 4 of former section 94-602 which required only general non-statutory intent to do harm willfully, wrongfully and unlawfully and did not require specific statutory intent to do any particular kind or degree of injury to victim. *State v. Fitzpatrick*, 149 M 400, 427 P 2d 300.

In prosecution for first-degree assault under former section 94-601, instruction dealing with intent and proof thereof was properly given since intent was essential element of crime. *State v. Gallagher*, 151 M 501, 445 P 2d 45.

Specific intent was not a necessary element of second degree assault under former section 94-602 upon showing of willful or wrongful infliction of grievous bodily harm upon another, and court properly refused instruction thereon notwithstanding statute providing that there must be unity of act and intent since latter statute was not applicable if specific intent was not an ingredient of crime charged. *State v. Warrick*, 152 M 94, 446 P 2d 916.

Dismissal of first degree assault charge under former section 94-601 was properly refused where there was evidence to support finding of jury that defendant had necessary intent. *State v. Bentley*, 155 M 383, 472 P 2d 864, distinguished in 157 M 452, 458, 486 P 2d 863.

Intent was to be judged objectively in first degree assault cases under former section 94-601 and not by the secret motive of the actor or some undisclosed purpose merely to frighten. *State v. Cooper*, 158 M 102, 489 P 2d 99, overruling *State v. Quinlan*, 126 M 52, 244 P 2d 1058.

#### Lesser Included Offense

In a prosecution for assault in the first degree under former section 94-601 the court could properly submit to the jury the question whether, in the evidence, the defendant, if not guilty as charged, was not guilty of assault in the second degree. *State v. Papp*, 51 M 405, 153 P 279.

Where the only evidence of assault was by pointing a firearm, defendant was either



guilty of second degree assault under former section 94-602 or not guilty of any offense, so that the giving of an instruction on third degree assault under former section 94-603 was error. *State v. Karri*, 84 M 130, 276 P 427.

Where the facts disclosed by the evidence under an information charging first degree assault under former section 94-601 constituted at least a second degree assault under former section 94-602 as found by the jury, or no offense at all, court was correct in not giving an instruction on third degree assault as described by former section 94-603, particularly where the record did not disclose any reason for such an instruction. *State v. Satterfield*, 114 M 122, 132 P 2d 372.

Trial court properly refused to instruct jury on third degree assault under former section 94-603 and limited jury's determination to conviction on second degree assault under former section 94-602 or acquittal, where grievous bodily harm was inflicted and only issue was whether act causing injury was accidental. *State v. Manning*, 160 M 50, 499 P 2d 771.

#### Pleadings

An information charging defendant with having willfully, unlawfully, and feloniously assaulted a person with a piece of iron pipe, with intent to inflict grievous bodily harm, was sufficient to charge the defendant with an assault with intent to commit a felony under former section 94-602, and gave the district court jurisdiction to try the cause. *State v. Farnham*, 35 M 375, 89 P 728.

An information charging that defendant "did willfully, unlawfully, wrongfully, intentionally, and feloniously assault one S., by throwing said S. from a moving streetcar, with intent to inflict grievous bodily harm upon said S.," was sufficient to charge assault in the second degree, under subdivision 3 of former section 94-602. *State v. Tracey*, 35 M 552, 90 P 791.

An information charging assault in the first degree with a deadly weapon under former section 94-601 was sufficient, the words following descriptive of the weapon, "to wit, an instrument about a foot long with a knob on the striking end," being surplusage, the only effect of which was to confine the prosecution to proof that the assault was committed with the instrument described and not with some other. *State v. Maggert*, 64 M 331, 209 P 989.

In charging the crime of assault in the second degree under former section 94-602, by willful or wrongful wounding or inflicting grievous bodily harm upon another, either with or without a weapon, the use of the word "feloniously" was not an

adequate substitute for "willfully" or "wrongfully." *State v. Williams*, 106 M 516, 79 P 2d 314.

Information charging defendant with unlawfully threatening another by pointing a loaded revolver at him charged a criminal offense under former section 94-602. *State v. Storm*, 124 M 102, 220 P 2d 674.

Information charging that defendant committed assault in the second degree under former section 94-602 by willfully, wrongfully, unlawfully, and feloniously assaulting a human being by wounding and inflicting grievous bodily harm contrary to form, force and effect of statute, sufficiently informed defendant of the crime with which he was charged. *State v. Straight*, 136 M 255, 347 P 2d 482.

Under former section 94-6423 information containing single count charging second degree assault under former section 94-602 was proper where only that crime was involved with at least two different ways of committing it; one by a direct assault and the other by aiding and abetting. *State v. Zadick*, 148 M 296, 419 P 2d 749.

#### Probable Cause

Denial of state's second application for leave to file information charging assault on ground that probable cause was not shown was an abuse of discretion where supplementary proof as to probable cause in the form of affidavits of deputy county attorney and six witnesses and copy of police report were filed, and where the district court, had, in denying first application for failure to have witnesses endorsed thereon, commented that probable cause existed. *State ex rel. McLatchy v. District Court*, 144 M 216, 395 P 2d 245.

While mere recital of injuries was not medically precise or overwhelmingly persuasive, but did show that injuries had been inflicted and that doctor, who was to testify at trial, had examined the victim, there was sufficient evidence stated in the information to establish probable cause that a second degree assault under former section 94-602 had been committed. *State ex rel. Pinsoneault v. District Court*, 145 M 233, 400 P 2d 269.

#### Sentence

Defendant was properly given eighteen-year sentence for assault in first degree under former section 94-601 where he plead guilty to three prior felony convictions. *State v. McLeod*, 131 M 478, 311 P 2d 400.

#### Sufficiency of Evidence

Where evidence did not show that defendant pointed gun at sheriff after he



was handed paper by deputy which purported to be a warrant but was not, evidence was insufficient to support a conviction under either subdivision 4 or 5 of former section 94-602. State v. Storm, 124 M 102, 220 P 2d 674.

Evidence was sufficient to justify a conviction of second degree assault under former section 94-602, when it was shown that defendant was with a group of boys who fired a barrage of shots at a house and some of the pellets hit the house; fact that prosecuting witness had moved to a position away from line of fire did not prevent the attack from being an assault upon him. State v. Simon, 126 M 218, 247 P 2d 481.

Evidence that defendant had previously threatened to kill sheriff and shortly thereafter pointed a loaded rifle at his stomach at point blank range and said he was going to shoot him supported conviction of first degree assault under former section 94-601. State v. Cooper, 158 M 102, 489 P 2d 99.

Where testimony indicated that only use of pistol by defendant was in restraining three girls who were hard to manage, used foul language, had taken sunglasses off racks with no apparent interest in purchasing any, spent a long time in the restroom, attempted to sell defendant and his helper magazines, and that one of the girls had thrown a pop bottle in the general direction of the de-

fendant, and there was no substantial evidence as to the fear or apprehension of the girls, trial court's conviction of second degree assault under former section 94-602 was reversed. State v. Sanders, 158 M 113, 489 P 2d 371, distinguished in — M —, 552 P 2d 616.

#### Variance between Charge and Proof

In a case in which the information charged assault with intent to commit rape, it was correct to instruct that the jury could find defendant guilty of either assault in the second degree or not guilty, and the instruction did not have to be that defendant was either guilty of assault with intent to commit rape or not guilty. State v. Collins, 88 M 514, 294 P 957.

Where defendant was charged with assault in the second degree as defined in subdivision 4 of former section 94-602 by use of a weapon likely to cause grievous bodily harm, it was error to introduce evidence that defendant in pointing firearm was resisting a lawful arrest by sheriff in violation of subdivision 5 of that section. State v. Storm, 124 M 102, 220 P 2d 674.

Even though, in an information charging second degree assault under former section 94-602, it was not charged specifically that a belt was used in the assault, admission of evidence that a belt was used was not error. State v. Straight, 136 M 255, 347 P 2d 482.

**94-5-203. Intimidation.** (1) A person commits the offense of intimidation when, with the purpose to cause another to perform or to omit the performance of any act, he communicates to another a threat to perform without lawful authority any of the following acts:

- (a) inflict physical harm on the person threatened or any other person or on property; or
- (b) subject any person to physical confinement or restraint; or
- (c) commit any criminal offense; or
- (d) accuse any person of an offense; or
- (e) expose any person to hatred, contempt, or ridicule; or
- (f) take action as a public official against anyone or anything or withhold official action, or cause such action or withholding.

(2) A person commits the offense of intimidation if he knowingly communicates a threat or false report of a pending fire, explosion, or disaster which would endanger life or property.

(3) A person convicted of the offense of intimidation shall be imprisoned in the state prison for any term not to exceed ten (10) years.

**History:** En. 94-5-203 by Sec. 1, Ch. 513, L. 1973.

**Source:** Substantially the same as Illinois Criminal Code, Chapter 38, section 12-6.

#### Commission Comment

Intimidation requires a specific purpose to cause another to perform "or to omit" the performance of any act (such as testifying), and the threat must be "com-

municated" with that purpose. It is also required that the act threatened, if performed, would be "without lawful authority." The section anticipates, therefore, that the accused is apprehended and prosecuted for intimidation before the harm threatened is performed. If the substantive harm occurs, the accused is subject to prosecution and punishment for the

more serious offense, or both intimidation and such offense. This section is all inclusive and includes public officials acting without authority.

The maximum penalty is relatively harsh, but since there is no minimum sentence the judge is able to fix the penalty to suit the crime.

## DECISIONS UNDER FORMER LAW

### Instructions to Jury

The giving of an instruction defining the word "extortion" in the language of former section 94-1602 was not objectionable, in an action to recover money paid under duress, it not being error to give instructions containing abstract statements of statutory law where the facts are few and simple. *Edquest v. Tripp & Dragstedt Co.*, 93 M 446, 19 P 2d 637.

### Threat To Discharge Worker

The right of an employee to work is not property, and therefore a complaint charging a foreman with extorting money from an employee by a threat to discharge him did not charge the crime of extortion under former section 94-1602. In *re McCabe*, 29 M 28, 73 P 1106.

## Part Three

### Kidnapping

**94-5-301. Unlawful restraint.** (1) A person commits the offense of unlawful restraint if he knowingly or purposely and without lawful authority restrains another so as to interfere substantially with his liberty.

(2) A person convicted of the offense of unlawful restraint shall be fined not to exceed five hundred dollars (\$500), or be imprisoned in the county jail for any term not to exceed six (6) months or both.

**History:** En. 94-5-301 by Sec. 1, Ch. 513, L. 1973.

**Source:** New.

### Commission Comment

This section is intended to deal with the problem of false imprisonment; however, unlawful restraint is a more accurate name

for the offense which embodies restraining another without authority of law. The principal distinctions between this section and the old code provision of R. C. M. 1947, section 94-3576 are the inclusion of the requirements of knowledge and purpose, and the substantial reduction in penalty.

## DECISIONS UNDER FORMER LAW

### Civil Liability

False imprisonment was treated as a tort and also as a crime under former section 94-3576, the definition being the same in either case. The liability of a wrongdoer did not depend primarily upon his mental attitude. *Kroeger v. Passmore*, 36 M 504, 93 P 805.

Former section 94-3576 which defined the crime of false imprisonment, defined also the civil wrong resulting from it; therefore, in order to make out a case for damages, the plaintiff had to allege a violation of his personal liberty, and that such violation was without legal justification. *Slifer v. Yorath*, 52 M 129, 155 P 1113.

### Official Restraint

Warden could not be held liable for failure to allow good behavior time to con-

vict and thus detaining him unlawfully when the prison board had not awarded the good behavior time. *Stephens v. Conley*, 48 M 352, 138 P 189.

Where, after an officer obtained the custody of another by a privileged arrest, he failed to use due diligence in taking him promptly before a proper court or magistrate, his misconduct made him liable to the person arrested only for such harm as was caused thereby but not for the arrest or for keeping him in custody prior to such misconduct; false imprisonment as defined by former section 94-3576 did not exist until the moment the imprisonment became unlawful. *Cline v. Tait*, 113 M 475, 129 P 2d 89.

In an action for false imprisonment brought by plaintiff against a sheriff and the surety on his official bond based on



unnecessary delay in taking plaintiff before a magistrate, it was necessary that the plaintiff prove that a magistrate was available on the particular day when the false imprisonment allegedly occurred. *Rounds v. Bucher*, 137 M 39, 349 P 2d 1026, 98 ALR 2d 962.

#### Release of Civil Claim

Where plaintiff compromised an action against the sheriff and his surety for false imprisonment and executed a release of defendants captioned "release in full of

all claims" and reciting that plaintiff accepted said sum as "complete compensation for all injuries sustained in connection with" the matters set forth in the complaint, a subsequent false imprisonment action against the county attorney was properly dismissed on motion for judgment on the pleadings, nothing appearing in the release reserving plaintiff's right to proceed against the county attorney. *Beedle v. Carolan*, 115 M 587, 148 P 2d 559.

**94-5-302. Kidnapping.** (1) A person commits the offense of kidnapping if he knowingly or purposely and without lawful authority restrains another person by either secreting or holding him in a place of isolation or by using or threatening to use physical force.

(2) A person convicted of the offense of kidnapping shall be imprisoned in the state prison for a term of not less than 2 years or more than 10 years, except as provided in 95-2206.18.

**History:** En. 94-5-302 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 7, Ch. 584, L. 1977.

**Source:** New.

#### Commission Comment

Both the Illinois Criminal Code and the Model Penal Code kidnapping provisions are marked by great detail in defining the offense. Under the Illinois Code, kidnapping may be either simple (misdemeanor or felony) or aggravated (felony), and there is a third offense entitled unlawful restraint (misdemeanor). The Model Penal Code contemplates offenses called kidnapping, felonious restraint, false imprisonment, and interference with custody. A detailed statement of the circumstances required for each offense is given in each provision.

It is possible that such a detailed treatment of the kidnapping provisions will lead to difficulties in interpreting ambiguous conduct and relating it to the stated offenses. Too often conduct which seems criminal escapes the precise language of

the statutes. The commission concluded that a carte blanche approach whereby the offenses of kidnapping and unlawful restraint are given broad definition was warranted. Any leniency justified by the character of such ambiguous conduct could best be considered and given effect in the sentence imposed. If this approach is utilized the range of punishment that may be imposed should be substantial.

It should be noted that subsection (1) conforms with current Montana law, that a showing of actual physical violence or threat of personal injury are not required to prove the force necessary to establish the crime. (*State v. Walker*, 139 M 276, 362 P 2d 548, 550.)

#### Amendments

The 1977 amendment substituted "a term of not less than 2 years or more than 10 years, except as provided in 95-2206.18" in subsection (2) for "any term not to exceed ten (10) years"; and made minor changes in punctuation and style.

### DECISIONS UNDER FORMER LAW

#### Force or Threat

Defendant was guilty of confining prison guard secretly against his will under former section 94-2602 where the evidence showed that defendant, an inmate of the state prison, walked behind prison guard with a knife, after another inmate had disarmed the guard, until the inmates had placed the guard in isolation. *State v. Frodsham*, 139 M 222, 362 P 2d 413.

On the trial of defendant charged with kidnapping a prison guard contrary to former section 94-2602 a showing of actual physical violence or threat of personal

injury was not required to prove the force necessary to establish the crime. *State v. Walker*, 139 M 276, 362 P 2d 548.

#### Pleadings

An information under former section 94-2602 was sufficient if it contained a statement of facts constituting the offense charged in ordinary and concise language so as to enable a person of common understanding to know what was intended. *State v. Randall*, 137 M 534, 353 P 2d 1054, 100 ALR 2d 171.



Information charging kidnaping "with intent" to confine clearly charged violation of former section 94-2602, rather than former section 94-2601, which required that defendant "attempt or cause" confinement. *State v. Corliss*, 150 M 40, 430 P 2d 632, cert. den. 390 US 961, 88 S Ct 1063.

#### Secret Confinement

The requirement of secrecy in former section 94-2602 was met where prison inmates took guards as hostages and held

them at an undisclosed place within the prison. *State v. Randall*, 137 M 534, 353 P 2d 1054, 100 ALR 2d 171.

#### Willfulness

Where defendant was charged with kidnaping a prison guard under former section 94-2602, it was a question for the jury whether defendant was acting under duress or coercion because of threats made to him by other convicts participating in riot. *State v. Walker*, 139 M 276, 362 P 2d 548.

**94-5-303. Aggravated kidnapping.** (1) A person commits the offense of aggravated kidnapping if he knowingly or purposely and without lawful authority restrains another person by either secreting or holding him in a place of isolation or by using or threatening to use physical force, with any of the following purposes:

- (a) to hold for ransom or reward or as a shield or hostage;
- (b) to facilitate commission of any felony or flight thereafter;
- (c) to inflict bodily injury on or to terrorize the victim or another;
- (d) to interfere with the performance of any governmental or political function; or

(e) to hold another in a condition of involuntary servitude.

(2) Except as provided in 95-2206.18, a person convicted of the offense of aggravated kidnapping shall be punished by death or life imprisonment as provided in 95-2206.6 through 95-2206.15 or be imprisoned in the state prison for a term of not less than 2 years or more than 100 years unless he has voluntarily released the victim, alive, in a safe place, and not suffering from serious bodily injury, in which event he shall be imprisoned in the state prison for a term of not less than 2 years or more than 10 years.

**History:** En. 94-5-303 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 12, Ch. 338, L. 1977; amd. Sec. 8, Ch. 584, L. 1977.

**Source:** Substantially the same as Model Penal Code, section 212.1.

#### Commission Comment

This section is derived almost exclusively from the Model Penal Code, section 212.1, and is generally intended to answer the question of when the crime of kidnaping should be punished by death. The section proposes to maximize the kidnaper's incentive to return the victim alive, by making the capital penalty apply only when the victim is not released, alive, in a safe place and not suffering from serious bodily injury.

#### Compiler's Notes

This section was amended twice in 1977, once by Ch. 338 and once by Ch. 584. Since the amendments do not appear to conflict, the Code Commissioner has made a composite section embodying the changes made by both amendments.

#### Amendments

Chapter 338, Laws of 1977, substituted

"death or life imprisonment as provided in 95-2206.6 through 95-2206.15" in subsection (2) for "death as provided in section 94-5-304"; and made minor changes in punctuation and style.

Chapter 584, Laws of 1977, inserted "Except as provided in 95-2206.18" at the beginning of subsection (2); substituted "a term of not less than 2 years or more than" in the middle, and at the end, of subsection (2) for "any term not to exceed"; and made minor changes in phraseology, punctuation and style.

#### Multiple Counts

It was not necessary to charge defendant with ten separate counts of kidnaping, specifying weapons used or the related felony, where a single count based on subdivision (1)(b) specifying the felonies of aggravated assault and sexual intercourse without consent, and a single count based on the statutory language of subdivision (1)(c) would fulfill the notice requirement of the statute. *State ex rel. McKenzie v. District Court of Ninth Judicial Dist.*, — M —, 525 P 2d 1211.

**94-5-304. Repealed.****Repeal**

Section 94-5-304 (Sec. 1, Ch. 513, L. 1973; Sec. 1, Ch. 126, L. 1974), relating to

death sentence for aggravated kidnapping, was repealed by Sec. 16, Ch. 338, Laws 1977.

**94-5-305. Custodial interference.** (1) A person commits the offense of custodial interference if, knowing that he has no legal right to do so, he takes, entices or withholds from lawful custody any child, incompetent person, or other person entrusted by authority of law to the custody of another person or institution.

(2) A person convicted of the offense of custodial interference shall be imprisoned in the state prison for any term not to exceed ten (10) years. A person does not commit an offense under this section if he voluntarily returns such person to lawful custody prior to trial.

**History:** En. 94-5-305 by Sec. 1, Ch. 513, L. 1973.

**Source:** New.

**Commission Comment**

Violation of lawful custody, especially of children, requires special legislation notwithstanding its similarity in some respects to kidnaping. The interest protected is not freedom from physical danger or terrorization by abduction, since that is adequately covered by sections 94-5-302 and 94-5-303, but rather the maintenance of parental custody against all unlawful interruption, even when the child is a willing, undeceived participant in the attack on the parental interest. The prob-

lem is further distinguishable from kidnaping by the fact that the offender will often be a parent or other person favorably disposed toward the child. One should be especially cautious in providing penal sanctions applicable to estranged parents struggling over the custody of their children, since such situations are better regulated by custody orders enforced through contempt proceedings. Despite these distinctive aspects of child-stealing and the existence of special provisions on the subject in most jurisdictions, the problem is frequently covered by kidnaping and the penalties and exceptions do not adequately reflect the special circumstances.

**Part Four****Robbery**

**94-5-401. Robbery.** (1) A person commits the offense of robbery if, in the course of committing a theft, he:

- (a) inflicts bodily injury upon another;
- (b) threatens to inflict bodily injury upon any person or purposely or knowingly puts any person in fear of immediate bodily injury; or
- (c) commits or threatens immediately to commit any felony other than theft.

(2) A person convicted of the offense of robbery shall be imprisoned in the state prison for a term of not less than 2 years or more than 40 years, except as provided in 95-2206.18.

(3) "In the course of committing a theft" as used in this section includes acts which occur in an attempt to commit or in the commission of theft or in flight after the attempt or commission.

**History:** En. 94-5-401 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 9, Ch. 584, L. 1977.

**Source:** Substantially the same as Model Penal Code, section 222.1.

**Commission Comment**

With some verbal changes the Montana draft on robbery parallels that of the Model Penal Code, section 222.1.



Common-law robbery was theft of property from the person or in the presence of the victim by force or by putting him in fear either of immediate bodily injury or of certain other grievous harms. The above draft does not explicitly include the traditional basis for classifying robbery as taking property from the person or in the presence of a person, but approaches the crime as one of immediate danger to the person and relies on the condition of violence or threatened violence to distinguish the crime from ordinary theft. The gist of the offense is taking by force or threat of force.

The above provision would apply where property was not taken from the person or from his presence. For example, an offender might threaten to shoot the victim in order to compel him to telephone directions for the disposition of property located elsewhere. Further, it is immaterial whether property is or is not obtained. This seems compatible with the theory of treating robbery as an offense against the person rather than against property. Hence, a completed robbery

may occur even though the crime is interrupted before the accused obtained the goods, or if the victim had no property to hand over. The section includes armed robbery. Further, subdivision (1)(b) encompasses the use of a toy or unloaded gun, since such a device can be employed to threaten serious injury and may be effective to create fear of such injury.

#### Amendments

The 1977 amendment substituted "a term of not less than 2 years or more than 40 years, except as provided in 95-2206.18" in subsection (2) for "any term not to exceed forty (40) years"; and made minor changes in phraseology and punctuation.

#### Knowingly or Purposely

The mental state required to commit the offense defined in subdivision (1)(b) of this section is "knowingly or purposely," and the jury need not consider "intent" as well, since the first two terms are substitutes for the older terms "intentionally" and "feloniously." *State v. Klein*, — M —, 547 P 2d 75.

### DECISIONS UNDER FORMER LAW

#### Conspiracy Evidence

Where defendant, while attempting to open the safe on a train, robbed a mail clerk, evidence as to details of the attempted train robbery and a conspiracy therefor was admissible to show the entire transaction in prosecution for robbery of clerk under former section 94-4301. *State v. Howard*, 30 M 518, 77 P 50.

#### Felonious Taking

An instruction defining robbery under former section 94-4301, which omitted to state "the taking" must be felonious, was prejudicially erroneous. *State v. Oliver*, 20 M 318, 50 P 1018. See also *State v. Rodgers*, 21 M 143, 53 P 97.

Evidence that victim had a certain amount of money in a wallet in his vest pocket nine days before an assault and that after the assault his vest was torn and the wallet and money were gone supported inference that the money was taken after the assault, thus that there was a robbery within the meaning of former section 94-4301. *State v. Olson*, 87 M 389, 287 P 938.

#### Force or Fear

The taking of personal property from the person or immediate presence of another, without resistance on his part, did not bring the offense within the definition of robbery under former section 94-4301; it was necessary that the element of force or fear be present to constitute the crime. *State v. Paisley*, 36 M 237, 92 P 566.

Since former section 94-4301 did not define the degree of force necessary to constitute the taking of personal property from the person or immediate presence of another, to constitute the crime of robbery, an information charging such offense was not required to allege the degree of force used. *State v. Paisley*, 36 M 237, 92 P 566.

Though the crime of robbery under former section 94-4301 could be accomplished only by means of force or fear, proof of an assault without showing that it was resorted to as a means to prevent resistance fell far short of establishing the crime of an attempt to commit robbery. *State v. Hanson*, 49 M 361, 141 P 669.

It is reasonable to presume fear where victim is forced to look down the barrel of a 45-caliber automatic pistol held by a stranger whose purpose is to rob him. *State v. Erickson*, 141 M 118, 375 P 2d 314, 316.

#### Pleadings

An indictment which charged that the defendant committed the robbery by force and intimidation and by putting the person robbed in fear, was sufficient under former section 94-4301. *State v. Clancy*, 20 M 498, 52 P 267.

An information on a prosecution for robbery under former section 94-4301, which charged that the property was taken by means of force and putting in fear, and that it was taken from the person in possession, and from the im-



mediate presence of a specified person, did not charge more than one offense. State v. Howard, 30 M 518, 77 P 50.

#### **Punishment**

Fifty-year sentence was warranted for defendant who had two previous convictions for burglary in another state. State v. Paisley, 36 M 237, 92 P 566.

Since there was no maximum penalty stated in former section 94-4303, it was pre-

sumed that person may be incarcerated for lifetime on conviction of robbery. Petition of Eldiwtw, 153 M 468, 457 P 2d 909.

In view of maximum punishment of life imprisonment presumably provided by former section 94-4303, former section 94-115 providing five-year maximum for felonies not otherwise punished did not apply, and ten-year sentence was authorized. Petition of O'Rourke, 154 M 265, 461 P 2d 1.

## **Part Five**

### **Sexual Crimes**

**94-5-501. Definitions.** As used in 94-5-503 and 94-5-505, the term "without consent" means:

- (1) the victim is compelled to submit by force or by threat of imminent death, bodily injury, or kidnapping to be inflicted on anyone; or
- (2) the victim is incapable of consent because he is:
  - (a) mentally defective or incapacitated;
  - (b) physically helpless; or
  - (c) less than 16 years old.

**History:** En. 94-5-501 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 2, Ch. 405, L. 1975; amd. Sec. 15, Ch. 359, L. 1977.

#### **Amendments**

The 1975 amendment designated the former section as subsection (1) and added subsection (2).

The 1977 amendment deleted former subsection (1) which read "In this part, unless a different meaning plainly is required, the definitions given in chapter 2, 94-2-101 apply"; and made minor changes in style and phraseology.

#### **Without Consent**

An instruction defining lack of consent to include "consent having been overcome by threats, or putting in fear of his [victim's] safety" was not prejudicial to defendant in a prosecution for deviate sexual conduct without consent, where the threats made all related to the victim's physical well being; it would have been better to charge in the words of the statute. State v. Ballew, — M —, 532 P 2d 407.

**94-5-502. Sexual assault.** (1) A person who knowingly subjects another not his spouse to any sexual contact without consent commits the offense of sexual assault.

(2) A person convicted of sexual assault shall be fined not to exceed five hundred dollars (\$500) or be imprisoned in the county jail for any term not to exceed six (6) months.

(3) If the victim is less than sixteen (16) years old and the offender is three (3) or more years older than the victim, or if the offender inflicts bodily injury upon anyone in the course of committing sexual assault, he shall be imprisoned in the state prison for any term not to exceed twenty (20) years.

(4) An act "in the course of committing sexual assault" shall include an attempt to commit the offense or flight after the attempt or commission.

**History:** En. 94-5-502 by Sec. 1, Ch. 513, L. 1973.

**Source:** Derived from Model Penal Code, section 213.4.

#### **Commission Comment**

This section is a substantial change from the old law. It carries out the rationale behind section 213.4 of the Model

Penal Code. This section deals with acts of sexual aggression which do not involve the element of "penetration" found in R. C. M. 1947, former section 94-4103. The range of activity covered extends from unauthorized fondling of a woman's breasts to homosexual manipulation of a boy's genitals. The old law did not differentiate sexual from other assault, except assault in connection with rape or lewd and lascivious acts upon children. The following considerations favor special treatment of indecent assault within the sexual offense category: (1) The individualized treatment of sexual misconduct with children is consistent with current legislation; (2) Societal concern with indecent assault focuses on the outrage, disgust or shame engendered in the victim rather than fear of physical injury; and (3) the gist of the offense being a sexual imposition, although of a lesser degree. The important features of this section require an actual

touching and leave for separate consideration cases of indecent exposure, etc. Although contact must be with the victim it need not be contact between the offender and the victim. Thus, subjecting another to sexual contact with a third person is covered. It covers situations of nonconsent only.

There is a maximum penalty of twenty years if the victim is under sixteen years and the defendant is three years or more older, covering the situation where sexual contact takes a deviate form in regard to children. The rationale behind heavy punishment of "lewd acts upon children" or statutory rape is victimization of immaturity. To give effect to the victimization rationale, an age differential in favor of the male is provided. Thus, a youth who had sexual contact with a fifteen-year-old girl would have to be eighteen years or older before such act is a criminal event.

#### DECISIONS UNDER FORMER LAW

##### Constitutionality

The legislature has the power to prohibit the commission of lewd and lascivious acts upon children under certain ages, and former section 94-4106, defining and prescribing punishment for such offense was constitutional. *State v. Kocher*, 112 M 511, 119 P 2d 35; *State v. Jensen*, 153 M 489, 458 P 2d 782.

##### Age of Defendant

The portion of former section 94-4106 giving an exemption of prosecution to a person under the age of eighteen years was a matter of defense, and negation thereof was not a necessary part of the information. *State v. Davis*, 141 M 197, 376 P 2d 727.

##### Assault and Attempted Rape Distinguished

Aggressive, indecent, immoral and grossly offensive contact without the consent of the female and with intent to induce her consent to sexual intercourse constituted simple assault but did not constitute attempt to rape in violation of former section 94-4101 where defendant could have accomplished his purpose by force but desisted when the female resisted. *State v. Hennessy*, 73 M 20, 234 P 1094.

##### Civil Action for Assault

In an action for damages for attempted rape the testimony of plaintiff should be considered in the light of all the attendant circumstances, as should also the question whether her subsequent conduct was the usual and natural conduct of an outraged woman as bearing upon the credibility of her direct testimony, such charges being easily made, often inspired

by malice, hidden motives or revenge, and hard to disprove. *Cullen v. Peschel*, 115 M 187, 142 P 2d 559.

##### Evidence of Other Offenses

In prosecution under former section 94-4106 for lewd and lascivious acts upon the person of a child below the age of sixteen years, committed on or about March 19, 1955, it was improper to permit state to show similar acts on August 4, 1951, and in June 1951 in the state of California because of the remoteness in time. *State v. Nicks*, 134 M 341, 332 P 2d 904, 77 ALR 2d 836.

In prosecution for attempted statutory rape, evidence that defendant could have been charged on a previous occasion and had been warned against association with under-age girls was inadmissible and its prejudice could not be overcome either by warnings to jury or by rebuttal evidence produced by defendant. *State v. Tiedemann*, 139 M 237, 362 P 2d 529, distinguished in 144 M 401, 396 P 2d 821, and in 155 M 119, 467 P 2d 692.

Where defendant was charged with violation of former section 94-4106, testimony of other women concerning similar improper acts committed by defendant on them was admissible, since such testimony showed continuous pattern of behavior on part of defendant. *State v. Jensen*, 153 M 233, 455 P 2d 631.

##### Intent

Evidence that defendant invited a nine-year-old girl, a stranger to him, to his room, locked the door, asked her to remove her dress and placed his hand on her shoulder as if to unbutton her dress,



showed that he had intent to arouse or gratify the passions of himself or the girl, and it was not essential that there be "flesh-to-flesh" contact. *State v. Kocher*, 112 M 511, 119 P 2d 35.

Evidence that defendant, while intoxicated, attempted to induce children to enter his automobile, entered their car and sat with them, trying to get them to shake hands with him, but departed when told to by one of the children, did not prove intent to arouse or gratify passions within the meaning of former section 94-4106, even when bolstered by psychiatric

testimony that defendant was a sexual deviate and ought to be confined. *State v. Green*, 143 M 234, 388 P 2d 362.

#### Punishment

A defendant convicted of a lewd and lascivious act upon a child under former section 94-4106 was properly sentenced to a term of not less than ten years pursuant to the second offense law, on proof that he had previously been convicted of lewd and lascivious acts upon a child. In re Davis' Petition, 139 M 622, 365 P 2d 948.

**94-5-503. Sexual intercourse without consent.** (1) A person who knowingly has sexual intercourse without consent with a person of the opposite sex not his spouse commits the offense of sexual intercourse without consent.

(2) A person convicted of sexual intercourse without consent shall be imprisoned in the state prison for a term of not less than 2 years or more than 20 years, except as provided in 95-2206.18.

(3) If the victim is less than 16 years old and the offender is 3 or more years older than the victim or if the offender inflicts bodily injury upon anyone in the course of committing sexual intercourse without consent, he shall be imprisoned in the state prison for any term of not less than 2 years or more than 40 years, except as provided in 95-2206.18.

(4) An act "in the course of committing sexual intercourse without consent" shall include an attempt to commit the offense or flight after the attempt or commission.

(5) No evidence concerning the sexual conduct of the victim is admissible in prosecutions under this section, except:

(a) evidence of the victim's past sexual conduct with the offender;

(b) evidence of specific instances of the victim's sexual activity to show the origin of semen, pregnancy, or disease which is at issue in the prosecution under this section.

(6) If the defendant proposes for any purpose to offer evidence described in subsection (5)(a) or (5)(b), the trial judge shall order a hearing out of the presence of the jury to determine whether the proposed evidence is admissible under subsection (5).

(7) Evidence of failure to make a timely complaint or immediate outcry does not raise any presumption as to the credibility of the victim.

**History:** En. 94-5-503 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 1, Ch. 2, L. 1975; amd. Sec. 1, Ch. 129, L. 1975; amd. Sec. 1, Ch. 94, L. 1977; amd. Sec. 16, Ch. 359, L. 1977; amd. Sec. 10, Ch. 584, L. 1977.

**Source:** Derived from Model Penal Code, section 213.0.

#### Commission Comment

The section provides no age limit on the male offender but section 94-2-109 and the juvenile law R. C. M. 1947, Title 10, provide jurisdictional limitations. Deviate forms of sexual intercourse are included

by definition (see section 94-2-101(56)) since these forms of sexual aggression are equally abhorrent. Sexual relations between married people are excluded. The section imposes an increased penalty if bodily injury occurs or there is a three or more year variation between the age of an under sixteen-year-old victim and the actor.

#### Compiler's Notes

This section was amended three times in 1977 by Chs. 94, 359, and 584. Since the amendments do not appear to conflict,



the Code Commissioner has made a composite section embodying the changes made by all amendments.

### Amendments

Chapter 2, Laws of 1975, substituted "A person" and "a person not his spouse" in subsection (1) for "A male person" and "a female not his spouse."

Chapter 129, Laws of 1975, made the same substitutions made by chapter 2; and added subsections (5) and (6).

Chapter 94, Laws of 1977, rewrote the last paragraph which read: "If the issue of failure to make a timely complaint or immediate outcry is raised, the jury shall be informed that such fact, standing alone, may not bar conviction."

Chapter 359, Laws of 1977, inserted "of the opposite sex" after "with a person" in subsection (1); designated the last two paragraphs as subsections (6) and (7); and made minor changes in phraseology, punctuation and style.

Chapter 584, Laws of 1977, substituted "a term of not less than 2 years or more than 20 years, except as provided in 95-2206.18" at the end of subsection (2) for "any term not to exceed twenty (20) years"; substituted "any term of not less than 2 years or more than 40 years, except as provided in 95-2206.18" at the end of subsection (3) for "any term not to exceed forty (40) years"; and made minor changes in phraseology, punctuation and style.

### Continuous Resistance Unnecessary

Law did not require that a woman put her life into jeopardy by continuous resistance to rape; testimony of victim that she submitted only after being told that her struggles would be futile because defendant would not let her go until he had finished was sufficient to show lack of consent. *State v. Glidden*, — M —, 529 P 2d 1384.

## DECISIONS UNDER FORMER LAW

### Constitutionality

This section is not unconstitutionally vague and ambiguous since the terms used are all defined in the Criminal Code. *State v. Ballew*, — M —, 532 P 2d 407.

Fact that former statute referred to "male persons" who had sexual intercourse with a "female" did not render it unconstitutional on account of an arbitrary distinction based solely on sex; since most perpetrators of act sought to be prohibited were male and most victims female, the classification was reasonable, and the fact that its application might result in some inequality was not sufficient grounds to invalidate it. *State v. Craig*, — M —, 545 P 2d 649.

### Corroboration of Confession

Where defendant in a prosecution for statutory rape under former section 94-4101 virtually enticed prosecutrix from her home and placed her in a house of unsavory reputation, kept her there for three or four days and did not disclose her whereabouts to her father who was searching for her, and in addition made a confession, these circumstances and a statement by a third party that parties had intercourse were sufficient to prove the corpus delicti and sustain conviction, despite the fact that prosecutrix, third party and defendant all repudiated prior statements to officers that the parties had intercourse. *State v. Trauffer*, 109 M 275, 97 P 2d 336.

### Federal Law as to Indians

In the prosecution of an Indian under former section 94-4101, for the crime of

rape committed upon a thirteen-year-old female Indian on a reservation, an information which failed to charge that force had been employed or that consent of the victim was lacking failed to state an offense under the federal law which adopted the state law definition of rape. *United States v. Rider*, 282 F 2d 476.

### Force and Violence

Evidence was insufficient to justify a conviction for rape charged to have been accomplished by violence and force, where it appeared that the prosecuting witness failed to make any outcry or to offer any physical resistance which required force to overcome, within the meaning of subdivision 3 of former section 94-4101. *State v. Needy*, 43 M 442, 117 P 102.

An information for rape under former section 94-4101, alleging that the act was committed by force and against the will and consent of the female, was sufficient, under subdivisions 3 and 4 of that section, and authorized proof that the act was committed under the circumstances provided for in either subdivision. *State v. Morrison*, 46 M 84, 125 P 649.

To warrant conviction for an attempt to commit rape by force under former section 94-4101, the evidence had to be sufficient to establish beyond a reasonable doubt that the defendant assaulted the prosecutrix with the intention to accomplish his purpose at all events and notwithstanding any resistance on her part; acquittal was required absent intent in the mind of the assailant to overcome by force all resistance which might be offered. *State v. Hennessy*, 73 M 20, 234 P 1094.

Evidence adduced in a prosecution for an attempted rape by force under former section 94-4104 was insufficient to sustain a verdict of guilty, it presenting a case of urgent solicitation rather than of an intention by the use of force to overcome the resistance of the prosecutrix. *State v. Hennessy*, 73 M 20, 234 P 1094.

Under former section 94-4101, an information charging rape accomplished by violence and force, and against the will and consent of the prosecuting witness, was sufficient and warranted proof either of resistance overcome by violence or superior force, or of threats of a nature to excuse nonresistance. *State v. Whitmore*, 94 M 119, 21 P 2d 58.

Under former section 94-4101, there was no variance between an information charging the commission of rape by violence and force, and the evidence of the prosecutrix that she was rendered helpless by a blow in the face which stunned her prior to the commission of the offense, even though she was unconscious or semi-conscious during its commission; such proof of her condition as a reason for nonresistance bringing the case within subdivision 3 of that section, i.e., rape, where the resistance of the female is overcome by violence or force. *State v. Whitmore*, 94 M 119, 21 P 2d 58.

#### Indictment and Information

In an indictment for rape under former section 94-4101, it was not necessary to allege that the female injured was not the wife of the defendant. *State v. Williams*, 9 M 179, 23 P 335; *State v. Morrison*, 46 M 84, 125 P 649.

#### Instructions to Jury

Instruction in rape case prosecuted under former section 94-4101, which intimated to jury that impact of guilty verdict could be lessened by court's imposition of light sentence was prejudicial to defendant, since punishment should not be a concern to jury in determining defendant's guilt or innocence. *State v. Zuidema*, 157 M 367, 485 P 2d 952, overruling *State v. Metcalf*, 153 M 369, 457 P 2d 453.

#### Juvenile Defendant

Since former section 94-4101 was repealed by implication by Laws of 1943, Ch. 227 (10-601 et seq.), and the amendments thereof, in so far as it was in conflict with the substance and intent thereof, the district criminal court was prohibited from trying child under the age of sixteen years charged with rape. He was solely under the exclusive jurisdiction of the juvenile court. *State ex rel. Dahl v. District Court*, 134 M 395, 333 P 2d 495.

#### Penetration

It was not error to instruct the jury in the language of former section 94-4103 that any penetration, however slight, was sufficient, or to add that "Proof of emission is not necessary." *State v. Bouldin*, 153 M 276, 456 P 2d 830.

#### Threats

Physical resistance by prosecutrix was not necessary element of rape where evidence supported conviction under subdivision 4 of former section 94-4101, which simply required that there be threats of immediate and great bodily harm, accompanied by apparent power of execution. *State v. Metcalf*, 153 M 369, 457 P 2d 453, overruled on other grounds in 157 M 367, 373, 485 P 2d 952.

#### Unconscious Victim

The term "unconscious" as used in subdivision 5 of former section 94-4101, defining the crime of rape, did not have reference to the loss of physical or mental faculties on the part of the female through assault and violence; the subdivision referred only to a situation where the victim was unconscious of the nature of the act. *State v. Whitmore*, 94 M 119, 21 P 2d 58.

#### Under-Age Victim

Under former section 94-4101, the question of force was immaterial where the prosecuting witness was under the statutory age of consent. *State v. Bowser*, 21 M 133, 53 P 179.

Under former section 94-4101, where an information in a rape case charged that defendant had carnal knowledge of a female under the statutory age of consent, violently, and against her will, and there was ample evidence that the female was under that age, it was not incumbent on the state to prove also that she resisted defendant's assault, and that he violently overcame her resistance, even though it had been so alleged. *State v. Mahoney*, 24 M 281, 61 P 647.

Under former section 94-4101, any man who accomplished an act of sexual intercourse with a female under the age of eighteen years, when such female was not his wife, was guilty of the crime of statutory rape. The corpus delicti was sufficiently proved by the testimony of the prosecutrix that she had sexual intercourse with the accused at the time and place set forth in the information. *State v. Reid*, 127 M 552, 267 P 2d 986.

Prima facie case of statutory rape was established by victim's testimony that defendant had sexual intercourse with her, corroborated by medical finding of sperm in vagina. *State v. Anderson*, 156 M 122, 476 P 2d 780.



**94-5-504. Indecent exposure.** (1) A person who, for the purpose of arousing or gratifying sexual desire of himself or of any person other than his spouse, exposes his genitals under circumstances in which he knows his conduct is likely to cause affront or alarm commits the offense of indecent exposure.

(2) A person convicted of the offense of indecent exposure shall be fined not to exceed five hundred dollars (\$500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both.

**History:** En. 94-5-504 by Sec. 1, Ch. 513, L. 1973.

**Source:** Substantially the same as Model Penal Code, section 213.5.

**Commission Comment**

The special case of genital exposure for sexual gratification has been placed in this

article along with other types of sexual aggression. It is not meant to include "indecent" brevity of attire, but rather "lewdness" which requires an awareness of the likelihood of affronting observers and is often a threat or prelude to overt sexual aggression.

**94-5-505. Deviate sexual conduct.** (1) A person who knowingly engages in deviate sexual relations, or who causes another to engage in deviate sexual relations commits the offense of deviate sexual conduct.

(2) A person convicted of the offense of deviate sexual conduct shall be imprisoned in the state prison for any term not to exceed ten (10) years.

(3) A person convicted of deviate sexual conduct without consent shall be imprisoned in the state prison for any term not to exceed twenty (20) years.

**History:** En. 94-5-505 by Sec. 1, Ch. 513, L. 1973.

**Source:** New.

**Commission Comment**

The section includes both homosexuality and bestiality. There has been a reduction in the penalty because it was felt that the severe penalty was more a product of revulsion than the social harm in fact committed. The Model Penal Code recommends that bestiality be made a misdemeanor. The Illinois Code contains no provision on the subject. Subsection (3) increases the penalty if the human-victim participant in the bestiality or homosex-

uality acts without consent. To appreciate the meaning and scope of "without consent" see sections 94-2-101(68) and 94-5-506(3).

**Instructions to Jury**

Where there was no specific reason to distrust the testimony of the complaining witness, it was not reversible error in a prosecution under this section to refuse an instruction that the witness' testimony should be viewed with caution since a sex offense is easily charged and difficult to disprove. *State v. Ballew*, — M —, 532 P 2d 407.

**DECISIONS UNDER FORMER LAW**

**Corroboration of Victim**

Evidence that defendant and a teenage boy spent a great deal of time together, that defendant had made many gifts to the boy, that the boy had been nervous and lost his appetite, that defendant and the boy were in separate beds in the same room when arrested, and that boy had relaxed sphincter muscles of the anus, was insufficient to corroborate boy's testimony as to perpetration of crime against nature on him. *State v. Keekonen*, 107 M 253, 84 P 2d 341.

Corroborating evidence to the testimony

of the victim showing only that victim, a young boy, slept with the defendant and stayed overnight at defendant's house on several occasions, was insufficient to sustain conviction of violation of former section 94-4-118, as it showed nothing more than opportunity to commit the crime. *State v. Gangner*, 130 M 533, 305 P 2d 338.

**Penetration**

Ambiguous testimony by eight-year-old victim as to whether anus was penetrated, uncorroborated by medical examination, was insufficient to support conviction of



completed infamous crime against nature. State v. Shambo, 133 M 305, 322 P 2d 657.

The infamous crime against nature prohibited by former section 94-4118 could be committed by penetration of the mouth. State v. Dietz, 135 M 496, 343 P 2d 539.

**94-5-506. Provisions generally applicable to sexual crimes.** (1) When criminality depends on the victim being less than 16 years old, it is a defense for the offender to prove that he reasonably believed the child to be above that age. Such belief shall not be deemed reasonable if the child is less than 14 years old.

(2) Whenever the definition of an offense excludes conduct with a spouse, the exclusion shall be deemed to extend to persons living as husband and wife regardless of the legal status of their relationship. The exclusion shall be inoperative as respects spouses living apart under a decree of judicial separation. Where the definition of an offense excludes conduct with a spouse, this shall not preclude conviction of a spouse in a sexual act which he or she causes another person, not within the exclusion, to perform.

(3) In a prosecution under the preceding sections on sexual crimes (94-5-502 through 94-5-504) in which the victim's lack of consent is based solely upon his incapacity to consent because he was mentally incapacitated, it is a defense to such prosecution that the victim was a voluntary social companion of the defendant and the intoxicating substance was voluntarily and knowingly taken.

**History:** En. 94-5-506 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 17, Ch. 359, L. 1977.

**Source:** Substantially the same as Model Penal Code, section 213.6.

#### Commission Comment

This section rejects the concepts of "vir-tue," "chastity," or "good repute" as possible defenses in sex crimes but does en-vision cases of precocious fourteen (14) year old girls and even very young prostitutes who might be the "victimizers," rather than the victims.

Subsection (2) precludes a prosecution for rape where the woman is living with the accused as his wife, regardless of the legal validity of their marital status. Nor is it possible to prosecute where the

spouses have been living apart without benefit of a judicial order. There is the possibility of consent in the resumption of sexual relations coupled with the special danger of fabricated accusations.

Conditions affecting a woman's capacity to "control" herself sexually will not in-volve criminal liability if her own actions were voluntary in bringing about the re-sult.

#### Amendments

The 1977 amendment substituted "exclu-sion" in the first sentence of subsection (2) for "extension"; substituted "hus-band" in the first sentence of subsection (2) for "man"; and made minor changes in phraseology and punctuation.

### DECISIONS UNDER FORMER LAW

#### Age of Victim

In a prosecution for rape under sub-division 1 of former section 94-4101 (fe-male under the age of eighteen years), it was immaterial that she consented to the act, that defendant was ignorant of

her age or that she misrepresented her age to him, or that she was lacking in chastity, or at the time was an inmate of a house of prostitution, nonage on her part being sufficient to warrant conviction. State v. Duncan, 82 M 170, 266 P 400.

## Part Six

### Offenses Against the Family

#### 94-5-601. Repealed.

##### Repeal

Section 94-5-601 (Sec. 1, Ch. 513, L.

1973), relating to definitions, was repealed by Sec. 77, Ch. 359, Laws 1977.

**94-5-602. Prostitution.** (1) A person commits the offense of prostitution if such person engages in or agrees or offers to engage in sexual intercourse with another person for compensation, whether such compensation is received or to be received, or paid or to be paid.

(2) A person convicted of prostitution shall be fined not to exceed five hundred dollars (\$500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both.

**History:** En. 94-5-602 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 1, Ch. 80, L. 1975.

**Source:** New.

**Commission Comment**

The prior law reflects the common-law concern for prostitution—i.e. the public nuisance aspects of open solicitation. The requirement that the solicitation be public seems at odds with the modern conception that prostitution, discreetly or indiscreetly carried on, ought to be controlled. This section 94-5-603(1)(a) reflects the position that professional prostitution is criminal even if carried on in private. Section 94-5-603(1)(b) adopts the idea that prostitution should be controlled when it mani-

festes itself in public solicitation, which may be an annoyance to passers by and an outrage to the moral sensibilities of a large part of the public. The penalty is a misdemeanor, the same as prior law.

**Amendments**

The 1975 amendment incorporated the text of former subdivision (1)(a) into the body of subsection (1); added "whether such compensation is received or to be received, or paid or to be paid" to subsection (1); deleted former subdivision (1)(b) which read: "loiters in or within view of any public place for the purpose of being hired to engage in sexual intercourse"; and made minor changes in style.

**94-5-603. Promoting prostitution.** (1) A person commits the offense of promoting prostitution if he purposely or knowingly commits any of the following acts:

(a) owns, controls, manages, supervises, resides in or otherwise keeps, alone or in association with others, a house of prostitution or a prostitution business; or

(b) procures an inmate for a house of prostitution or a place in a house of prostitution for one who would be an inmate; or

(c) encourages, induces, or otherwise purposely causes another to become or remain a prostitute; or

(d) solicits a person to patronize a prostitute; or

(e) procures a prostitute for a patron; or

(f) transports a person into or within this state with the purpose to promote that person's engaging in prostitution, or procures or pays for transportation with that purpose; or

(g) leases or otherwise permits a place controlled by the offender alone or in association with others, to be regularly used for prostitution or for the procurement of prostitution, or fails to make reasonable effort to abate such use by ejecting the tenant, notifying law enforcement authorities, or using other legally available means; or

(h) lives in whole or in part, upon the earnings of a person engaging in prostitution, unless the person is the prostitute's minor child or other legal dependent incapable of self-support.

(2) A person commits the offense of aggravated promotion of prostitution if he purposely or knowingly commits any of the following acts:

(a) Compels another to engage in or promote prostitution.

(b) Promotes prostitution of a child under the age of eighteen (18) years, whether or not he is aware of the child's age.



(c) Promotes the prostitution of one's spouse, child, ward or any person for whose care, protection or support he is responsible.

(3) A person convicted of promoting prostitution shall be fined not to exceed five hundred dollars (\$500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both. A person convicted of aggravated promotion of prostitution shall be imprisoned in the state prison for any term not to exceed twenty (20) years.

(4) Evidence. On the issue whether a place is a house of prostitution the following, in addition to all other admissible evidence, shall be admissible:

(a) Its general repute; the repute of the persons who reside in or frequent the place; or the frequency, timing and duration of visits by nonresidents.

(b) Testimony of a person against his spouse shall be admissible under this section.

**History:** En. 94-5-603 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 2, Ch. 2, L. 1975.

**Source:** New.

#### Commission Comment

This section creates a comprehensive single offense of promoting prostitution, embracing many different acts of collaboration with or exploiting of prostitutes found in prior law as separate offenses. Many undesirable consequences under prior law were possible: accumulation of sentences based on separate convictions for what are really parts of a single criminal transaction, e.g., procuring, transporting, receiving money; unfair double trials, as where a county attorney proceeds for transporting after losing on a procuring charge.

In general the subsidiary clauses of section 94-5-603 are based on prior legislation. Subsection (1)(a) covers R. C. M. 1947, sections 94-3607 and 94-3608. Subsection (1)(b) covers R. C. M. 1947, sections 94-4110, 94-4111, 94-4112, 94-4113 and 94-4114. Subsection (1)(c) also covers the circumstances embraced in R. C. M. 1947, sections 94-4110, 94-4112, and 94-4115. Subsection (1)(d) covers R. C. M. 1947, section 94-3610; subsection (1)(e) covers R. C. M. 1947, section 94-4114. Subsection (1)(f) deals with transportation that promotes prostitution. At the level of interstate and foreign commerce, the federal Mann Act strikes at the organized business of interstate prostitution. This subsection covers local transporting and makes it clear that the transporter must have the purpose to promote, in addition to the knowledge that his action fa-

cilitates prostitution. Subsection (1)(g) adopts the principle of prior law, R. C. M. 1947, section 94-3608 making the landlord criminally responsible if he knowingly lets premises for the purpose of prostitution. This subsection is not meant to impose a duty of inquiry or of criminal liability for negligent failure to discover the illicit use of leased premises. Subsection (1)(h) is based on R. C. M. 1947, section 94-4117 which provides for punishment of those who derive their livelihood from the prostitution of others, excepting minor children and dependent adults. Promoting prostitution is a misdemeanor, but a more severe penalty is provided if aggravating circumstances are present.

Special rules of evidence to provide for admission of evidence of repute of alleged houses of prostitution, as well as incriminating testimony against a spouse, are necessary to prove the offense. Abrogation of the common-law privilege of the defendant to bar his spouse from testifying against him has special utility in prosecuting pimps who are not infrequently married to the prostitute.

#### Amendments

The 1975 amendment substituted "one's spouse" for "his wife" in subdivision (2)(c).

#### Effective Date

Section 3 of Ch. 2, Laws 1975 provided the act should be in effect from and after its passage and approval. Approved February 6, 1975.

### DECISIONS UNDER FORMER LAW

#### Inducement

An attempt to induce a female to take up her residence in another state for immoral purposes, which was complete be-

fore transportation had commenced, was punishable under former section 94-4110 and not under the Mann Act. *State v. Reed*, 53 M 292, 163 P 477.



**Interstate Transportation**

Former section 94-4109 prohibiting the importation or exportation of females for immoral purposes was wholly void since Congress had legislated upon the matter in the Mann Act (U. S. C. Tit. 18, §§ 2421-2424). Ex parte Anderson, 125 M 331, 238 P 2d 910.

**Procuring**

Evidence that defendant obtained and paid rent on prostitute's apartment, forced her to stay there, procured for her and took all money was sufficient for conviction under former section 94-4110. State v. Crockett, 148 M 402, 421 P 2d 722.

**Receiving Prostitute's Earnings**

Where defendant had given his note for money he obtained from a prostitute, he was not guilty of a violation of former section 94-4116, prohibiting the accepting of money from such persons without consideration, even though he later refused to

pay the note placed in a bank for collection. State v. Jones, 51 M 390, 153 P 282.

Knowingly and without consideration taking or receiving from a prostitute any of her earnings was a separate and distinct offense under former section 94-4116 from that of living upon her earnings. State v. Kanakaris, 54 M 180, 169 P 42.

Defendant with independent means who was in no way dependent on a prostitute was not guilty of living on her earnings in violation of former section 94-4117 even though he received money from her. State v. Kanakaris, 54 M 180, 169 P 42.

Provision in former section 94-4116 making the acceptance of money from a prostitute presumptive evidence of lack of consideration was valid. State v. Pippi, 59 M 116, 195 P 556.

Evidence that defendant cashed check given to prostitute by male brought to her by defendant who coerced her to prostitute for him was sufficient to support conviction under former section 94-4114. State v. Crockett, 148 M 402, 421 P 2d 722.

**94-5-604. Bigamy.** (1) A person commits the offense of bigamy if, while married, he knowingly contracts or purports to contract another marriage, unless at the time of the subsequent marriage:

(a) the offender believes on reasonable grounds that the prior spouse is dead; or

(b) the offender and the prior spouse have been living apart for five (5) consecutive years throughout which the prior spouse was not known by the offender to be alive; or

(c) a court has entered a judgment purporting to terminate or annul any prior disqualifying marriage, and the offender does not know that judgment to be invalid; or

(d) the offender reasonably believes that he is legally eligible to remarry.

(2) A person convicted of bigamy shall be fined not to exceed five hundred dollars (\$500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both.

**History:** En. 94-5-604 by Sec. 1, Ch. 513, L. 1973.

**Source:** Substantially the same as Model Penal Code, section 230.1.

**Commission Comment**

This section has a broader coverage than prior law in that it applies to anyone who has "contracted a marriage." It is possible to contract a marriage which is a legal nullity. A man could marry a woman who, unknown to him, is already married to another and could marry again without bothering to divorce the first woman. Or a man could marry successively two women who, by reason of youth or mental defect, are incapable of contracting marriage.

In each case he demonstrates a disposition to plural marriage, unless he comes within the good faith defense of subsection (1)(c). The concept of marriage in this section includes common-law marriage contracted in a jurisdiction that recognizes this form of marriage. Subsection (1)(a) absolves the defendant in a bigamy case that he believed his spouse to be dead. On policy grounds there is no valid reason to stigmatize or punish remarriage by people who in good faith believe themselves to be widows or widowers.

Subsection (1)(b) creates an exception based on a five-year conclusive presumption of death. Subsections (1)(c) and (d) provide that one who has a reasonable basis for believing himself

legally eligible to marry does not commit a criminal offense by a second marriage. Questions of the validity of foreign divorces are so perplexing that lawyers and the courts are often divided on the legal issues. It is well-settled that a single person who marries a divorced person is not liable to punishment if he made a reason-

able mistake as to the legal validity of the other's divorce. It seems harsh to subject a defendant, who remarries following an out-of-state divorce, to a criminal bigamy prosecution where a person sophisticated in law might be unsure as to the validity of the foreign divorce. This section is intended to avoid such a result.

### DECISIONS UNDER FORMER LAW

#### Prior Bigamous Marriage

A bigamous marriage, though void for civil purposes, is still valid for criminal purposes until pronounced void by a competent court, and a third marriage without a decree declaring the second marriage

void was bigamous even though defendant had obtained a divorce from his first wife and even though the second marriage was void from the beginning for civil purposes. *State v. Crosby*, 148 M 307, 420 P 2d 431; *Crosby v. Ellsworth*, 431 F 2d 35.

**94-5-605. Marrying a bigamist.** (1) A person commits the offense of marrying a bigamist if he contracts or purports to contract a marriage with another knowing that the other is thereby committing bigamy.

(2) A person convicted of the offense of marrying a bigamist shall be fined not to exceed five hundred dollars (\$500) or be imprisoned in the county jail for any period not to exceed six (6) months, or both.

**History:** En. 94-5-605 by Sec. 1, Ch. 513, L. 1973.

**Source:** New.

#### Commission Comment

This section also applies to someone

who purports to contract a marriage. Like prior law, this section punishes the knowing participation in a bigamous marriage. The punishment has been reduced to a misdemeanor which should provide sufficient deterrent.

**94-5-606. Incest.** (1) A person commits the offense of incest if he knowingly marries or cohabits or has sexual intercourse with an ancestor, a descendant, a brother or sister of the whole or half blood. "Cohabit" means to live together under the representation of being married. The relationships referred to herein include blood relationships without regard to legitimacy, and relationships of parent and child by adoption.

(2) A person convicted of incest shall be imprisoned in the state prison for any term not to exceed ten (10) years.

**History:** En. 94-5-606 by Sec. 1, Ch. 513, L. 1973.

**Source:** New.

#### Commission Comment

This section is patterned after the Model Penal Code. The uncle-aunt-nephew-niece cases are excluded from the category of "felonious incest," in view of the severity of the penalty.

The marriage regulations of R. C. M.

1947, section 48-105 circumscribe marriage more strictly than the criminal incest law, but different considerations justify a more limited scope in criminal incest vis a vis a marriage contract. Relations between uncles and under-age nieces would be "sexual intercourse without consent." "Ancestor" and "descendant" include all persons in lineal ascent and descent from one body.

### DECISIONS UNDER FORMER LAW

#### Marital Status of Parties

There was no substantial change in the charge under former section 94-705 where the court allowed the state to amend an information charging defendant with incest by changing "fornication" to "adul-

tery." Whether the defendant was married or unmarried at the time was not a material ingredient of the offense. In either event the defendant was guilty, if the intercourse charged was proved. *State v. Kuntz*, 130 M 126, 295 P 2d 707.



**Single Act**

A single act of sexual intercourse was sufficient to support a conviction under former section 94-705 and it was not neces-

sary that fornication be open as required under the section making fornication a crime. *Territory v. Corbett*, 3 M 50.

**94-5-607. Endangering the welfare of children.** (1) A parent, guardian, or other person supervising the welfare of a child less than 16 years old commits the offense of endangering the welfare of children if he knowingly endangers the child's welfare by violating a duty of care, protection, or support.

(2) A parent or guardian or any person who is 18 years of age or older, whether or not he is supervising the welfare of the child, commits the offense of endangering the welfare of children if he knowingly contributes to the delinquency of a child less than 16 years old by:

(a) supplying or encouraging the use of intoxicating substances by the child; or

(b) assisting, promoting, or encouraging the child to:

(i) abandon his place of residence without the consent of his parents or guardian;

(ii) enter a place of prostitution; or

(iii) engage in sexual conduct.

(3) A person convicted of endangering the welfare of children shall be fined not to exceed \$500 or imprisoned in the county jail for any term not to exceed 6 months, or both. A person convicted of a second offense of endangering the welfare of children shall be fined not to exceed \$1,000 or imprisoned in the county jail for any term not to exceed 6 months, or both.

(4) On the issue of whether there has been a violation of the duty of care, protection, and support, the following, in addition to all other admissible evidence, is admissible: cruel treatment; abuse; infliction of unnecessary and cruel punishment; abandonment; neglect; lack of proper medical care, clothing, shelter, and food; and evidence of past bodily injury.

(5) The court may order, in its discretion, any fine levied or any bond forfeited upon a charge of endangering the welfare of children paid to or for the benefit of the person or persons whose welfare the defendant has endangered.

**History:** En. 94-5-607 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 1, Ch. 85, L. 1975; amd. Sec. 1, Ch. 218, L. 1977; amd. Sec. 18, Ch. 359, L. 1977.

**Source:** New.

**Commission Comment**

This section penalizes a limited class of misbehavior by a parent or other person legally responsible for the care and supervision of children. This offense can be committed only by an act or omission in violation of a legal duty. That legal duty may be one which does not itself carry a penal sanction; this section adds the penal sanction when violation of the duty creates a known danger to the child.

Although the commission recognizes that prosecution of parents will seldom be a constructive solution to intra-family problems, it seems worthwhile to retain a penal sanction for gross breach of parental responsibility. Also provision is made that any criminal fine levied against the offender may be used to aid the disadvantaged minor. The age designation is arbitrary but consistent with the other provisions in the code intended to protect children.

**Compiler's Notes**

This section was amended twice in 1977, once by Ch. 218 and once by Ch. 359. Since the amendments do not appear to



conflict, the Code Commissioner has made a composite section embodying the changes made by both amendments.

#### Amendments

The 1975 amendment inserted subsection (2); designated former subsections (2) to (4) as (3) to (5); and added the second sentence in subsection (3).

Chapter 218, Laws of 1977, substituted "any person who is 18 years of age or older, whether or not he is supervising the welfare of the child" near the middle of subsection (2) for "other person"; substituted "child" for "youth" near the end of subsection (2); divided portions of subdivision (2)(b) into separate items; deleted "leave or" after "encouraging a child

to" at the end of the introductory paragraph of subdivision (2)(b); deleted "or to enter places exclusively for adults" at the end of subdivision (2)(b); and made minor changes in phraseology and punctuation.

Chapter 359, Laws of 1977, substituted "child less than 16 years old" near the end of subsection (2) for "youth"; deleted "Evidence" at the beginning of subsection (4); and made minor changes in phraseology, punctuation and style.

#### Effective Date

Section 2 of Ch. 85, Laws 1975 provided the act should be in effect from and after its passage and approval. Approved March 19, 1975.

**94-5-608. Nonsupport.** (1) A person commits the offense of nonsupport if he fails to provide support which he can provide and which he knows he is legally obliged to provide to a spouse, child, or other dependent.

(2) A person commits the offense of aggravated nonsupport if:

- (a) the offender has left the state to avoid the duty of support; or
- (b) the offender has been previously convicted of the offense of nonsupport.

(3) A person convicted of nonsupport shall be fined not to exceed \$500 or be imprisoned in the county jail for any term not to exceed 6 months, or both. A person convicted of aggravated nonsupport shall be imprisoned in the state prison for any term not to exceed 10 years.

(4) The court may order, in its discretion, any fine levied or any bond forfeited upon a charge of nonsupport paid to or for the benefit of any person that the defendant has failed to support.

**History:** En. 94-5-608 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 19, Ch. 359, L. 1977.

**Source:** New.

#### Commission Comment

This section confines the criminal offense of nonsupport to failure to provide support which the accused knows he is legally obliged to provide. The policy of the former law is retained, that is, the section is designed to compel the defendant to perform his duty rather than make him an object of exemplary punishment. Exemplary punishment is of doubtful efficacy in complex family situations, where many forces, both social and economic, may combine to excuse the behavior. The fact that nonsupport can be prosecuted lays the basis for intervention by the

county attorney, who can thus provide legal aid to indigent families and coerce the accused to support his family. The problem of enforcing support obligations of defendants who leave their families and go to another state has been largely solved by the Uniform Reciprocal Enforcement of Support Act. However, extraditing the defendant on a felony criminal charge is still possible under the aggravating circumstances of subsection (2).

#### Amendments

The 1977 amendment added "or" to the end of subsection (2)(a); substituted "any person" for "person or persons" in subsection (4); and made minor changes in style.

**94-5-609. Unlawful transactions with children.** (1) A person commits the offense of unlawful transactions with children if he knowingly:

- (a) sells or gives explosives to a child under the age of majority except as authorized under appropriate city ordinances; or

(b) sells or gives intoxicating substances to a child under the age of majority; or

(c) being a junk dealer, pawnbroker or secondhand dealer he receives or purchases goods from a child under the age of majority without authorization of the parent or guardian.

(2) A person convicted of the offense of unlawful transactions with children shall be fined not to exceed five hundred dollars (\$500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both. A person convicted of a second offense of unlawful transactions with children shall be fined not to exceed one thousand dollars (\$1,000) or be imprisoned in the county jail for any term not to exceed six (6) months, or both.

**History:** En. 94-5-609 by Sec. 1, Ch. 513, L. 1973.

**Source:** New.

#### Commission Comment

This section is merely a partial recodification of a number of statutes on unlawful transactions with children. (See R. C. M. 1947, sections 94-35-106 to 94-35-106.2, 94-3702 and 69-1902.) Other statutes relating to children were repealed. (See R. C. M. 1947, sections 94-35-138, 94-35-137 and 94-35-208.) The substance of still other statutes relating to children were placed elsewhere in the code.

#### Compiler's Notes

Section 2, Ch. 264, Laws 1977, proposes to amend this section to read as follows: "94-5-609. Unlawful transactions with children. (1) A person commits the offense of unlawful transactions with children if he knowingly:

"(a) sells or gives explosives to a child under the age of majority except as authorized under appropriate city ordinances; or

"(b) sells or gives intoxicating substances other than alcoholic beverages to a child under the age of majority;

"(c) sells or gives alcoholic beverages to a person under 19 years of age; or

"(d) being a junk dealer, pawnbroker, or secondhand dealer he receives or purchases goods from a child under the age of majority without authorization of the parent or guardian.

"(2) A person convicted of the offense of unlawful transactions with children shall be fined not to exceed \$500 or be imprisoned in the county jail for any term not to exceed 6 months, or both. A person convicted of a second offense of unlawful transactions with children shall be fined not to exceed \$1,000 or be imprisoned in the county jail for any term not to exceed 6 months, or both."

Section 4, Ch. 264, Laws 1977 provides: "Sections 1, 2, and 3 of this act [amending sections 4-6-104, 94-5-609, and 94-5-610], if approved by the electors of the state of Montana, are effective January 1, 1979."

Section 5, Ch. 264, Laws 1977, provides: "The question of whether this act will become effective shall be submitted to the electors of the state of Montana at the general election to be held November 7, 1978, by printing on the ballot the full title, and the following:

☐ FOR raising the legal drinking age to 19.

☐ AGAINST raising the legal drinking age to 19."

### DECISIONS UNDER FORMER LAW

#### Entrapment

Entrapment was no defense in a prosecution for selling liquor to a minor even though a public officer gave the minor money and instructed him to buy whiskey, whereupon the minor entered defendant's bar, offered to buy and was sold whiskey, where the officers did not induce the sale by defendant or mislead him as to the minor's age. *State v. Parr*, 129 M 175, 283 P 2d 1086, 55 ALR 2d 1313.

#### Furnishing Liquor

Evidence that defendant poured drinks containing intoxicating liquor and set them

out on a dresser in his hotel room and that a minor picked one up and consumed it supported conviction under former section 94-35-106. *State v. Clark*, 87 M 416, 288 P 186.

#### Intoxicating Beverage

Information charging defendant with selling intoxicating liquor to minor was sufficient even though it did not specify the kind of liquor furnished. *State v. Baker*, 87 M 295, 286 P 1113.

Information charging sale of intoxicating beverage to minor was sufficient when it described the beverage as "beer," and it



was not necessary to allege the percentage of alcohol. *State v. Winter*, 129 M 207, 285 P 2d 149.

In prosecution for violation of former section 94-35-106, corpus delicti was established by evidence that the defendant poured minor a drink from a bottle marked "Vodka." *State v. Moore*, 138 M 379, 357 P 2d 346.

#### License

In prosecution for selling intoxicating liquor to a minor, it was immaterial whether defendant was licensed under the alcoholic beverage laws, and amendment of information to insert allegation that defendant was an employee of a licensee was surplusage and not prejudicial to defendant. *State v. Winter*, 129 M 207, 285 P 2d 149.

#### Misrepresentation of Age

In a prosecution under former section 94-35-106 for furnishing liquor to a minor, misrepresentation of age by the minor was no defense and it was immaterial what

precautions defendant took to ascertain the buyer's age. *State v. Paskvan*, 131 M 316, 309 P 2d 1019.

Minor who misrepresented his age to obtain liquor was guilty of violation of section 4-3-306, rather than being an accomplice under former section 94-35-106, and it was not necessary to corroborate his testimony as to his own age. *State v. Paskvan*, 131 M 316, 309 P 2d 1019.

#### Other Transactions

In prosecution for selling liquor to a particular minor, testimony by six other minors as to purchases by them from defendant was admissible under proper instructions to jury. *State v. Gussenhoven*, 116 M 350, 152 P 2d 876.

#### Punishment

Amount of punishment imposed for selling intoxicating liquor to a minor under former section 94-35-106 was for the legislature and not for review by supreme court. *State v. Gussenhoven*, 116 M 350, 152 P 2d 876.

### 94-5-610. Unlawful possession of intoxicating substance by children.

(1) A person who has not reached the age of majority commits the offense of possession of intoxicating substance if he knowingly has in his possession an intoxicating substance, except a person who has not reached the age of majority does not commit the offense of possession of an intoxicating substance when in the course of his employment, he bags, carries or transports beer for customers at a grocery store.

(2) A person convicted of the offense of possessing an intoxicating substance shall be fined not to exceed \$50 or be imprisoned in the county jail for any term not to exceed 10 days, or both. If proceedings are held in the youth court, the preceding penalty does not apply and the offender shall be treated as an alleged youth in need of supervision as defined in 10-1203(13). In such case, the youth court may enter its judgment under 10-1222.

**History:** En. 94-5-610 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 1, Ch. 87, L. 1974; amd. Sec. 1, Ch. 536, L. 1977.

**Source:** Substantially the same as Revised Codes of Montana 1947, section 94-35-106.2.

#### Commission Comment

This section is merely a recodification of the present statute on this subject.

#### Compiler's Notes

Section 3, Ch. 264, Laws 1977, proposes to amend this section to read as follows: "94-5-610. Unlawful possession of intoxicating substance by children. (1) A person under the age of 18 years commits the offense of possession of intoxicating substance if he knowingly has in his possession an intoxicating substance other than

an alcoholic beverage. A person under the age of 19 commits the offense of possession of an intoxicating substance if he knowingly has in his possession an alcoholic beverage, except that he does not commit the offense when in the course of his employment it is necessary to possess alcoholic beverages.

"(2) A person convicted of the offense of possessing an intoxicating substance shall be fined not to exceed \$50 or be imprisoned in the county jail for any term not to exceed 10 days, or both."

Section 4, Ch. 264, Laws 1977 provides: "Sections 1, 2, and 3 of this act [amending sections 4-6-104, 94-5-609, and 94-5-610], if approved by the electors of the state of Montana, are effective January 1, 1979."

Section 5, Ch. 264, Laws 1977, provides: "The question of whether this act will be-



come effective shall be submitted to the electors of the state of Montana at the general election to be held November 7, 1978, by printing on the ballot the full title, and the following:

☐ FOR raising the legal drinking age to 19.

☐ AGAINT raising the legal drinking age to 19."

### Amendments

The 1974 amendment added the exception at the end of subdivision (1); and made a minor change in punctuation.

The 1977 amendment added the last two sentences of subsection (2); and made minor changes in style.

## 94-5-611, 94-5-612. (11023, 11024) Repealed.

### Repeal

Sections 94-5-611 and 94-5-612 (Sec. 41, p. 184, Bannack Stat.; Sec. 481, Pen. C.

1895; Sec. 29, Ch. 513, L. 1973), relating to producing a miscarriage, was repealed by Sec. 77, Ch. 359, Laws 1977.

**94-5-613. Short title.** This act shall be known and may be cited as the "Montana Abortion Control Act."

**History:** En. 94-5-613 by Sec. 1, Ch. 284, L. 1974.

### Title of Act

An act regulating abortions; providing

for keeping of records of abortions; declaring the right to refuse to participate in abortions; protecting the life of the fetus; providing penalties, and an effective date.

**94-5-614. Statement of purpose.** The legislature reaffirms the tradition of the state of Montana to protect every human life, whether unborn or aged, healthy or sick. In keeping with this tradition and in the spirit of our constitution, we reaffirm the intent to extend the protection of the laws of Montana in favor of all human life.

**History:** En. 94-5-614 by Sec. 2, Ch. 284, L. 1974.

**94-5-615. Definitions.** As used in this act the following definitions apply:

(1) "Department" means the department of health and environmental sciences provided for in Title 82A, chapter 6.

(2) "Facility" means a hospital, health care facility, physician's office, or other place in which an abortion is performed.

(3) (a) "Informed consent" means voluntary consent to an abortion by the woman upon whom the abortion is to be performed only after full disclosure to her by the physician who is to perform the abortion of such of the following information as is reasonably chargeable to the knowledge of the physician in his professional capacity:

(i) the stage of development of the fetus, the method of abortion to be utilized, and the effects of such abortion method upon the fetus;

(ii) the physical and psychological effects of abortion; and

(iii) available alternatives to abortion, including childbirth and adoption.

(b) Informed consent may be evidenced by a written statement in a form prescribed by the department and signed by the physician and the woman upon whom the abortion is to be performed in which the physician certifies that he has made the full disclosure provided above and in which

the woman upon whom the abortion is to be performed acknowledges that the above disclosures have been made to her and that she voluntarily consents to the abortion.

(4) "Abortion" means the performance of, assistance or participation in the performance of, or submission to an act or operation intended to terminate a pregnancy without live birth.

(5) "Viability" means the ability of a fetus to live outside the mother's womb, albeit with artificial aid.

**History:** En. 94-5-615 by Sec. 3, Ch. 284, L. 1974; amd. Sec. 38, Ch. 187, L. 1977.

#### Amendments

The 1977 amendment added "provided for in Title 82A, chapter 6" to subsection (1); inserted the subdivision designations under subsection (3); changed the designations of the subheadings under subdivi-

sion (3)(a) from letters to roman numerals; and made minor changes in style, punctuation and phraseology.

#### Repealing Clause

Section 39 of Ch. 187, Laws 1977 read "Sections 41-2101 through 41-2108, 69-1924, and 82-1232, R.C.M. 1947, are repealed."

**94-5-616. Consent to abortion.** (1) No abortion may be performed upon any woman in the absence of informed consent.

(2) No abortion may be performed upon any woman in the absence of:

(a) the written notice to her husband, unless her husband is voluntarily separated from her;

(b) the written notice to a parent, if living, or the custodian or legal guardian of such woman, if she is under eighteen (18) years of age and unmarried.

(3) The above informed consent or consent is not required if a licensed physician certifies the abortion is necessary to preserve the life of the mother.

(4) No executive officer, administrative agency or public employee of the state of Montana or of any local governmental body has power to issue any order requiring an abortion or shall coerce any woman to have an abortion, nor shall any person coerce any woman to have an abortion.

(5) Violation of subsection (1), (2) or (4) of this section is a misdemeanor.

(6) The use of the prescribed departmental form of informed consent required by section 3 [94-5-615(3)] shall not be mandatory until July 1, 1974. Prior thereto, a written statement fairly setting forth the content specified by section 3 [94-5-615(3)] shall be in compliance therewith.

**History:** En. 94-5-616 by Sec. 4, Ch. 284, L. 1974.

**94-5-617. Protection of life and health of infant.** (1) A person commits the offense of criminal homicide, as defined in sections 94-5-101 through 94-5-104, if he purposely, knowingly, or negligently causes the death of a premature infant born alive, if such infant is viable.

(2) Whenever a premature infant which is the subject of abortion if is born alive and is viable, it becomes a dependent and neglected child subject to the provisions of state law, unless:

(a) the termination of the pregnancy is necessary to preserve the life of the mother; or

(b) the mother and her spouse, or either of them, have agreed in writing in advance of the abortion, or within seventy-two (72) hours thereafter, to accept the parental rights and responsibilities of the premature infant if it survives the abortion procedure.

(3) No person may use any premature infant born alive for any type of scientific research, or other kind of experimentation except as necessary to protect or preserve the life and health of such premature infant born alive.

(4) The department shall make regulations to provide for the humane disposition of dead infants or fetuses.

(5) Violation of subsection (3) of this section is a felony.

History: En. 94-5-617 by Sec. 5, Ch. 284, L. 1974; amd. Sec. 13, Ch. 338, L. 1977.

#### Amendments

The 1977 amendment substituted "94-5-104" for "94-5-105" in subsection (1).

**94-5-618. Control of practice of abortion.** (1) No abortion may be performed within the state of Montana:

(a) except by a licensed physician;

(b) after the first 3 months of pregnancy, except in a hospital licensed by the department;

(c) after viability of the fetus, unless in appropriate medical judgment the abortion is necessary to preserve the life or health of the mother. An abortion under this subsection (1)(c) may only be performed if:

(i) the foregoing judgment of the physician who is to perform the abortion is first certified in writing by him, setting forth in detail the facts upon which he relies in making such judgment; and

(ii) two other licensed physicians have first examined the patient and concurred in writing with such judgment.

The foregoing certification and concurrence is not required if a licensed physician certifies the abortion is necessary to preserve the life of the mother.

(2) The timing and procedure used in performing an abortion under subsection (1) (c) of this section must be such that the viability of the fetus is not intentionally or negligently endangered, as the term "negligently" is defined in 94-2-101(31). The fetus may be intentionally endangered or destroyed only if necessary to preserve the life or health of the mother.

(3) No physician, facility, or other person or agency shall engage in solicitation, advertising, or other form of communication having the purpose of inviting, inducing, or attracting any person to come to such physician, facility, or other person or agency to have an abortion or to purchase abortifacients.

(4) Violation of subsections (1) and (2) of this section is a felony. Violation of subsection (3) of this section is a misdemeanor.



History: En. 94-5-618 by Sec. 6, Ch. 284, L. 1974; amd. Sec. 20, Ch. 359, L. 1977.

#### Amendments

The 1977 amendment changed the refer-

ence in subsection (2) to conform to the amendment of section 94-2-101; and made minor changes in phraseology, punctuation and style.

**94-5-619. Reporting of practice of abortion.** (1) Every facility in which an abortion is performed within the state of Montana shall keep on file upon a form prescribed by the department a statement dated and certified by the physician who performed the abortion setting forth such information with respect to the abortion as the department by regulation shall require; including, but not limited to, information on prior pregnancies; the medical procedure employed to administer the abortion; the gestational age of the fetus; the vital signs of the fetus after abortion, if any; and if after viability, the medical procedures employed to protect and preserve the life and health of the fetus.

(2) The physician performing an abortion shall cause such pathology studies to be made in connection therewith as the department shall require by regulation, and the facility shall keep the reports thereof on file.

(3) In connection with an abortion, the facility shall keep on file the original of each of the documents required by this act relating to informed consent, consent to abortion, certification of necessity of abortion to preserve the life or health of the mother, and certification of necessity of abortion to preserve the life of the mother.

(4) Such facility shall within thirty (30) days after the abortion file with the department a report upon a form prescribed by the department and certified by the custodian of the records or physician in charge of such facility setting forth all of the information required in subsections (1), (2), and (3) of this section, except such information as would identify any individual involved with the abortion. The report shall exclude copies of any documents required to be filed by subsection (3) of this section, but shall certify that such documents were duly executed and are on file.

(5) All reports and documents required by this act shall be treated with the confidentiality afforded to medical records, subject to such disclosure as is permitted by law; except that statistical data not identifying any individual involved in an abortion shall be made public by the department annually, and the report required by subsection (4) of this section to be filed with the department shall be available for public inspection except in so far as it identifies any individual involved in an abortion. Names and identities of persons submitting to abortion shall remain confidential among medical and medical support personnel directly involved in the abortion, and among persons working in the facility where the abortion was performed whose duties include billing the patient or submitting claims to an insurance company, keeping facility records, or processing abortion data required by state law.

(6) The department shall report to the attorney general any apparent violation of this act.

(7) The reports required by this section shall not be mandatory for any abortion performed prior to July 1, 1974.

**History:** En. 94-5-619 by Sec. 7, Ch. 284,  
L. 1974.

**94-5-620. Refusal to participate in abortion.** (1) No private hospital or health care facility shall be required contrary to the religious or moral tenets or the stated religious beliefs or moral convictions of its staff or governing board to admit any person for the purpose of abortion or to permit the use of its facilities for such purpose. Such refusal shall not give rise to liability of such hospital or health care facility, or any personnel or agent or governing board thereof, to any person for damages allegedly arising from such refusal, nor be the basis for any discriminatory, disciplinary, or other recriminatory action against such hospital or health care facility, or any personnel, agent, or governing board thereof.

(2) All persons shall have the right to refuse to advise concerning, perform, assist, or participate in abortion because of religious beliefs or moral convictions. If requested by any hospital or health care facility, or person desiring an abortion, such refusal shall be in writing signed by the person refusing, but may refer generally to the grounds of "religious beliefs and moral convictions." The refusal of any person to advise concerning, perform, assist, or participate in abortion, shall not be a consideration in respect of staff privileges of any hospital or health care facility, nor a basis for any discriminatory, disciplinary, or other recriminatory action against such person, nor shall such person be liable to any person for damages allegedly arising from refusal.

(3) It shall be unlawful to interfere or attempt to interfere with the right of refusal authorized by this section. The person injured thereby shall be entitled to injunctive relief, when appropriate, and shall further be entitled to monetary damages for injuries suffered.

(4) Such refusal by any hospital or health care facility or person shall not be grounds for loss of any privileges or immunities to which the granting of consent may otherwise be a condition precedent, or for the loss of any public benefits.

(5) As used in this section, the term "person" includes one or more individuals, partnerships, associations, and corporations.

**History:** En. 94-5-620 by Sec. 8, Ch. 284,  
L. 1974.

**94-5-621. Other regulations.** The department shall make regulations for a comprehensive system of reporting of maternal deaths and complications within the state of Montana resulting directly or indirectly from abortion, subject to the provisions of section 7 [94-5-619(5)] of this act.

**History:** En. 94-5-621 by Sec. 9, Ch. 284,  
L. 1974.

**94-5-622. Penalties.** (1) A person convicted of criminal homicide under this act is subject to the penalties prescribed by sections 94-5-101 through 94-5-104.

(2) A person convicted of a felony other than criminal homicide under this act is subject to a fine not to exceed one thousand dollars

(\$1,000), or imprisonment in the state prison for a term not to exceed five (5) years, or both.

(3) A person convicted of a misdemeanor under this act is subject to a fine not to exceed five hundred dollars (\$500), or imprisonment in the county jail for a term not to exceed six (6) months, or both.

**History:** En. 94-5-622 by Sec. 10, Ch. 284, L. 1974; amd. Sec. 14, Ch. 338, L. 1977.

#### **Amendments**

The 1977 amendment substituted "94-5-104" in subsection (1) for "94-5-105."

#### **Separability Clause**

Section 15 of Ch. 338, Laws 1977 read "If a part of this act is invalid, all valid

parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications."

#### **Repealing Clause**

Section 16 of Ch. 338, Laws 1977 read "Sections 94-5-105, 94-5-304, and 95-2206.1, R.C.M. 1947, are repealed."

**94-5-623. Legislative intent.** It is the intent of the legislature to restrict abortion to the extent permissible under decisions of appropriate courts or paramount legislation.

**History:** En. 94-5-623 by Sec. 11, Ch. 284, L. 1974.

**94-5-624. Severability.** It is the intent of the legislature that if a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all the valid applications that are severable from the invalid applications.

**History:** En. 94-5-624 by Sec. 12, Ch. 284, L. 1974.

#### **Effective Date**

Section 13 of Ch. 284, Laws 1974 pro-

vided the act should be in effect from and after its passage and approval. Approved March 25, 1974.

## **CHAPTER 6**

### **OFFENSES AGAINST PROPERTY**

#### **Part 1—Criminal Mischief and Arson**

- Section 94-6-102. Criminal mischief.  
94-6-103. Negligent arson.  
94-6-104. Arson.

#### **Part 2—Criminal Trespass and Burglary**

- 94-6-201. Definition.  
94-6-202. Criminal trespass to vehicles.  
94-6-203. Criminal trespass to property.  
94-6-204. Burglary.  
94-6-205. Possession of burglary tools.

#### **Part 3—Theft and Related Offenses**

- 94-6-302. Theft.  
94-6-303. Theft of lost or mislaid property.  
94-6-304. Theft of labor or services or use of property.  
94-6-304.1. Obtaining communication services with intent to defraud.  
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- 94-6-305. Unauthorized use of motor vehicles.
- 94-6-306. Offender's interest in the property.
- 94-6-307. Deceptive practices.
- 94-6-308. Deceptive business practices.
- 94-6-308.1. Chain distributor schemes.
- 94-6-309. Issuing a bad check.
- 94-6-310. Forgery.
- 94-6-311. Obscuring the identity of a machine.
- 94-6-312. Illegal branding or altering or obscuring a brand.
- 94-6-313. Defrauding creditors.
- 94-6-314. Effect of criminal possession of stolen property.

## Part 1

### Criminal Mischief and Arson

#### 94-6-101. Repealed.

##### Repeal

Section 94-6-101 (Sec. 1, Ch. 513, L. 1973), relating to definitions, was repealed by Sec. 77, Ch. 359, Laws 1977.

**94-6-102. Criminal mischief.** (1) A person commits the offense of criminal mischief if he knowingly or purposely:

(a) injures, damages or destroys any property of another or public property without consent; or

(b) without consent tampers with property of another or public property so as to endanger or interfere with persons or property or its use; or

(c) damages or destroys property with the purpose to defraud an insurer; or

(d) fails to close a gate previously unopened which he has opened, leading in or out of any inclosed premises. This does not apply to gates located in cities or towns.

(2) A person convicted of the offense of criminal mischief shall be fined not to exceed five hundred dollars (\$500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both. If the offender commits the offense of criminal mischief and causes pecuniary loss in excess of one hundred fifty dollars (\$150), or injures or kills a commonly domesticated hoofed animal, or causes a substantial interruption or impairment of public communication, transportation, supply of water, gas, or power, or other public services, he shall be imprisoned in the state prison for any term not to exceed ten (10) years.

**History:** En. 94-6-102 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 1, Ch. 88, L. 1975.

**Source:** New.

##### Commission Comment

This section defines the behavior that is punishable because it harms or threatens to harm property. In so far as the section deals with purposeful, unjustified actual harm to property, it corresponds to the traditional "malicious mischief" offense. This section would include killing, maiming, or poisoning livestock. The section is more comprehensive and requires proof of a different mental state than prior law.

Subsection (2) classifies some criminal mischief a felony by providing imprison-

ment up to ten (10) years in the state prison for causing pecuniary loss in excess of one hundred fifty (\$150) dollars. Under the old malicious mischief section (R. C. M. 1947, section 94-3301) the amount of loss required for a felony conviction was only fifty (\$50) dollars and there was a mandatory minimum penalty of one year. This section has changed the minimum amount necessary for a felony conviction to conform with changing values.

##### Amendments

The 1975 amendment inserted "or public property" after "property of another" in subdivisions (1)(a) and (b).

## DECISIONS UNDER FORMER LAW

**Burning of Jail**

Prisoner who started fire in jail portion of the courthouse which fire spread and consumed the entire building was properly charged with second degree arson rather than with destroying a jail. *Petition of Weiss*, — M —, 511 P 2d 1319.

**Lesser Included Offenses**

The malicious destruction of property was not included in the crime of willful and malicious burning of property, as defined by former section 94-3303. *State v. Sieff*, 54 M 165, 168 P 524.

**Maiming of Animal**

To constitute the act of "maiming" an animal, a felony within the meaning of former section 94-1208, permanent injury must have been inflicted. *State v. Benson*, 91 M 21, 5 P 2d 223.

Evidence that defendant fired a load of shot into horse at a distance of ten feet and at a point nearest the heart supported an inference of intent to kill or maim and a conviction for attempt to maim under former section 94-1208. *State v. Benson*, 91 M 21, 5 P 2d 223.

**94-6-103. Negligent arson.** (1) A person commits the offense of negligent arson if he purposely or knowingly starts a fire or causes an explosion, whether on his own property or property of another and thereby negligently:

- (a) places another person in danger of death or bodily injury; or
- (b) places property of another in danger of damage or destruction.

(2) A person convicted of the offense of negligent arson shall be fined not to exceed five hundred dollars (\$500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both. If the offender places another person in danger of death or bodily injury, he shall be imprisoned in the state prison for any term not to exceed ten (10) years.

**History:** En. 94-6-103 by Sec. 1, Ch. 513, L. 1973.

**Source:** New.

**Commission Comment**

Section 94-6-103 differs substantially from the current Model Arson Law. First, it eliminates the grading of arson into degrees by reference to the class of property destroyed. Second, it prohibits negligent uses of fire or explosives which endanger persons or property unaccompanied by injury or damage, and third, it includes the burning of one's own property in circumstances where there is a high risk that the fire will spread to property of others

or where the burning of lesser forms of property is accomplished in close proximity to occupied structures.

The provisions of subsection (1) are to be construed as pertaining to affirmative knowing and purposeful acts and are not intended to include omissions to report, control or combat a fire which has placed a person in danger of bodily injury or death, or an occupied structure in danger of damage or destruction. If a person starts a fire negligently or fails to control a fire thus placing persons or property in danger the act is made punishable by R. C. M. 1947, section 28-115.

**94-6-104. Arson.** (1) A person commits the offense of arson when, by means of fire or explosives, he knowingly or purposely:

- (a) damages or destroys an occupied structure which is property of another without consent; or
- (b) places another person in danger of death or bodily injury.

(2) A person convicted of the offense of arson shall be imprisoned in the state prison for any term not to exceed twenty (20) years.

**History:** En. 94-6-104 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 1, Ch. 261, L. 1975.

**Source:** New.

**Commission Comment**

This section, together with section 94-

6-103, Negligent arson, is intended to completely replace the old Model Arson Law which classifies offenses in an illogical and arbitrary fashion. The burning of an empty, isolated dwelling could result in a twenty (20) year sentence under R.

C. M. 1947, section 94-502, while setting fire to a crowded church or theater or jail could yield only a maximum sentence of ten (10) years under R. C. M. 1947, section 94-503. Moreover, it makes little sense to treat the burning of miscellaneous personal property, whether out of malice or to defraud insurers a special category of crime apart from the risks associated from burning. To destroy a valuable painting

or manuscript by burning it in a hearth or furnace cannot be distinguished criminologically from any other method of destruction.

#### Amendments

The 1975 amendment inserted "which is property" after "structure" in subdivision (1)(a).

### DECISIONS UNDER FORMER LAW

#### Lesser Included Offense

The malicious destruction of property was not included in the crime of willful

and malicious burning of property, as defined by former section 94-3303. *State v. Sieff*, 54 M 165, 168 P 524.

### 94-6-105. [Transferred.]

#### Compiler's Notes

Section 74, Ch. 359, Laws of 1977, renumbered this section as sec. 94-8-209.3.

## Part 2

### Criminal Trespass and Burglary

**94-6-201. Definition.** (1) "Enter or remain unlawfully." A person enters or remains unlawfully in or upon any vehicle, occupied structure, or premises when he is not licensed, invited, or otherwise privileged to do so. A person who enters or remains upon land does so with privilege unless notice is personally communicated to him by an authorized person or unless such notice is given by posting in a conspicuous manner.

(2) In no event shall civil liability be imposed upon the owner or occupier of premises by reason of any privilege created by this section.

**History:** En. 94-6-201 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 21, Ch. 359, L. 1977.

**Source:** New.

#### Commission Comment

The core of the common-law concept of burglary was breaking and entering a dwelling house at night with intent to commit a felony therein. The scope of the offense has enlarged until under prevailing law, the offense may be committed by entry alone, in daytime as well as by night, in any building, structure, or "vehicle."

In this code "occupied structure" is narrowly defined to include buildings where people are living or working and where

intrusions are most alarming and dangerous. For example, the definition does not include barns, or derelict and abandoned buildings unsuited for human occupancy. In the case of a mine or ship, for example, occupancy would have to be proved. "Entering or remaining unlawfully" is a concept which takes a middle ground between prevailing law requiring breaking and its complete elimination in some modern legislation.

#### Amendments

The 1977 amendment substituted "section" at the end of subsection (2) for "action"; and made minor changes in style, phraseology and punctuation.

### DECISIONS UNDER FORMER LAW

#### Uninclosed Range Land

The proviso to former section 94-35-237, requiring the marking of boundaries as a prerequisite to criminal liability for driving herds onto private land, did not change the rule relating to civil liability that a

herder must determine the boundaries of private land at his peril. *Herrin v. Sieben*, 46 M 226, 127 P 323, overruled on other grounds in 131 M 494, 501, 311 P 2d 982, 986.



**94-6-202. Criminal trespass to vehicles.** (1) A person commits the offense of criminal trespass to vehicles when he purposely or knowingly and without authority enters any vehicle or any part thereof.

(2) A person convicted of the offense of criminal trespass to vehicles shall be fined not to exceed five hundred dollars (\$500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both.

**History:** En. 94-6-202 by Sec. 1, Ch. 513, L. 1973.

**Source:** Substantially the same as Illinois Criminal Code, Chapter 38, section 21-2.

**Commission Comment**

The section is intended to cover a

troublesome area of criminal activity which is easily identifiable and well-known to the police. The section covers only trespass to vehicles, aircraft or watercraft. If the trespass involves damage to a vehicle, the separate offense of criminal mischief (94-6-102) is committed.

**94-6-203. Criminal trespass to property.** (1) A person commits the offense of criminal trespass to property if he knowingly:

- (a) enters or remains unlawfully in an occupied structure; or
- (b) enters or remains unlawfully in or upon the premises of another.

(2) A person convicted of the offense of criminal trespass to property shall be fined not to exceed five hundred dollars (\$500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both.

**History:** En. 94-6-203 by Sec. 1, Ch. 513, L. 1973.

**Source:** Substantially the same as Illinois Criminal Code, Chapter 38, section 21-3.

**Commission Comment**

This section covers criminal trespass to land without regard to the nature, use or location of the land. Criminal trespass is committed only if the offender, immediately prior to entry, receives oral or writ-

ten notice that such entry is forbidden, or he remains upon the land after being notified to leave. The section differs substantially from R. C. M. 1947, section 94-3308, "Malicious injuries to freehold," in that no specific act causing damage need be alleged, only the unlawful presence of the offender. Should damage occur during the trespass, the offender could be prosecuted under section 94-6-102, Criminal Mischief.

## DECISIONS UNDER FORMER LAW

### Hunting on Posted Land

A person who hunted on inclosed land without the consent of one entitled to its possession was a trespasser, and where the

land was posted warning against hunting, was in violation of former section 94-3309. *Herrin v. Sutherland*, 74 M 587, 241 P 328.

**94-6-204. Burglary.** (1) A person commits the offense of burglary if he knowingly enters or remains unlawfully in an occupied structure with the purpose to commit an offense therein.

(2) A person commits the offense of aggravated burglary if he knowingly enters or remains unlawfully in an occupied structure with the purpose to commit a felony therein, and

(a) in effecting entry or in the course of committing the offense or in immediate flight thereafter, he or another participant in the offense is armed with explosives or a weapon; or

(b) in effecting entry or in the course of committing the offense, or in immediate flight thereafter he purposely, knowingly, or negligently inflicts or attempts to inflict bodily injury upon anyone.

(3) A person convicted of the offense of burglary shall be imprisoned in the state prison for any term not to exceed ten (10) years. A person convicted of the offense of aggravated burglary shall be imprisoned in the state prison for any term not to exceed forty (40) years.

**History:** En. 94-6-204 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 1, Ch. 260, L. 1975.

**Source:** New.

#### **Commission Comment**

The definition of a burglarious entry, i.e., "unprivileged entry" takes a middle ground between the common-law requirement of "breaking" and the complete elimination of that requirement in some modern statutes. The basic concept of "breaking" seems to be an unlawful intrusion, or as defined in section 94-6-201, "entering or remaining unlawfully." This definition is meant to exclude from burglary the servant who enters his employer's house meaning to steal silver; the shop-lifter who enters a store during business hours to steal from the counter; the fireman who forms the intent, as he breaks down the door of a burning house, to steal some of the householder's belongings and similar acts in which the defendant is lawfully on the premises.

Where breaking is not required there has been a tendency to hold that guilt may

be established by proof that the proscribed intent was secretly entertained in the mind of the entrant although apart from this secret intent the entrance at that time and place would have been authorized. For example, in *People v. Brittain*, 142 Cal 8, 75 P 314, it was held one could be convicted of burglary for entering a store with larcenous intent. The commission rejects this view and approves of the decision of *State v. Starkweather*, 89 M 381, 297 P 497 as a more practical result.

#### **Amendments**

The 1975 amendment inserted "unlawfully" after "remains" in subsection (2).

#### **"Occupied Structure"**

Semitrailer attached to sleeper-cab tractor was an "occupied structure" within meaning of this section, and therefore, defendant who entered it and removed a number of cases of beer was properly convicted of burglary. *State v. Shannon*, — M —, 554 P 2d 743.

### **DECISIONS UNDER FORMER LAW**

#### **Breaking**

Former section 94-901 did not require a breaking of the enclosure but only an unlawful entry, and the word "break" in an information was surplusage. *State v. Dixon*, 80 M 181, 260 P 138.

#### **Building**

A sheep wagon covered, enclosed by four walls and used as a dwelling by a sheep herder was a "building" within the meaning of former section 94-901, even though it was on wheels rather than affixed to the ground, and it could be the object of a burglary. *State v. Ebel*, 92 M 413, 15 P 2d 233.

#### **Burning of Jail**

Prisoner who started fire in jail portion of the courthouse which fire spread and consumed the entire building was properly charged with second degree arson rather than with destroying a jail. *Petition of Weiss*, — M —, 511 P 2d 1319.

#### **Corpus Delicti**

Proof that furnishings in a billiard hall were in order when it was locked up at night, that the furnishings were in disorder when the hall was unlocked the next morning, and that some articles were missing, established the corpus delicti of burglary under former section 94-901 even

without proof of the means by which entry was effected, and defendant's confession became admissible. *State v. Dixon*, 80 M 181, 260 P 138.

#### **Degrees of Burglary**

On prosecution of an information under former section 94-901 which did not state the degree of the offense or whether it was committed by day or night, where neither the verdict nor the judgment of conviction specified the degree of the offense but the judgment included a sentence that was authorized only for first degree burglary, it was presumed that the judgment was supported by evidence that the offense was committed at night. *State v. Mish*, 36 M 168, 92 P 459; *State ex rel. Williams v. Henry*, 119 M 271, 174 P 2d 220.

#### **Description of Property**

In information for burglary under former section 94-901, charging entry with intent to commit larceny, then describing the property taken, the description was surplusage and there was no charge of the actual commission of larceny. *State v. Board*, 135 M 139, 337 P 2d 924.

#### **Evidence of Other Offenses**

Evidence of defendant's possession of a comb taken in a previous burglary of the same structure was inadmissible since



mere possession did not prove defendant's guilt of the previous burglary beyond a reasonable doubt, and its admission in a prosecution under former section 94-901 for a subsequent burglary was prejudicial. *State v. Ebel*, 92 M 413, 15 P 2d 233.

#### **Evidence of Purchase of Valuable Goods**

Defendant's watch and ring together with purchase receipt for same were properly admitted in evidence for purpose of showing a substantial change in defendant's pecuniary circumstances subsequent to the burglary, and their admission raised no inference that the items had been stolen. *State v. Pepperling*, — M —, 533 P 2d 283.

#### **Felony**

Since former section 94-903 provided for imprisonment in the state prison for burglary, it was a felony, and dismissal of the first information did not bar a subsequent prosecution on a second information. *State v. McGowan*, 113 M 591, 131 P 2d 262.

#### **Forcible Entry**

Defendant who exceeded invitation given as a business invitee and stayed in pharmacy after business was closed became a trespasser; subsequent theft of goods from pharmacy constituted a burglary. *State v. Watkins*, — M —, 518 P 2d 259.

#### **Identification of Money**

Inability of witness to identify his money positively did not render the money inadmissible, where the money stolen consisted of uncirculated bills and rolls of Indian head pennies, and the money in defendant's possession corresponded in a close and peculiar way. *State v. Pepperling*, — M —, 533 P 2d 283.

#### **Information and Indictment**

Allowing prosecution to amend charges in information from first degree burglary to burglary on motion presented on day of trial was not error since elements of crime and proof required for conviction remained the same. *State v. Stewart*, — M —, 507 P 2d 1050.

#### **Intent**

Instruction charging jury to acquit if it found that defendant entered building with lawful intent was properly refused in the absence of evidence that defendant may have had that intent. *State v. Larson*, 75 M 274, 243 P 566.

It was not necessary to a conviction under former section 94-401 that express intent to commit larceny or any felony be proved; rather, it may be manifested by all the circumstances. *State v. Board*, 135 M 139, 337 P 2d 924.

Entry to tavern after closing hours with unauthorized duplicate key, and defendant's subsequent apprehension outside tavern with checks and currency identified as having come from tavern safe, showed felonious intent. *State v. Harris*, 159 M 425, 498 P 2d 1222.

Defendant's intent to commit larceny from van was established by evidence that a pair of bolt cutters with a padlock in its jaws was found in defendant's car which was backed up to side door of van, a group of tools had been stacked near door of van in anticipation of removal, defendant had been seen leaving the van, and there was no justification for defendant to have entered van. *State v. Austad*, — M —, 533 P 2d 1069.

#### **Possession of Stolen Property**

Proof of the corpus delicti, together with evidence that the property taken was found in defendant's possession and that defendant made inconsistent and partially incriminating statements as to the manner in which the property came into his possession, supported a conviction under former section 94-901. *State v. Kinghorn*, 109 M 22, 93 P 2d 964.

It was permissible for court to instruct, in prosecution for burglary under former section 94-901, that one found in possession of property from burglarized premises is bound to explain possession in order to remove the effect of possession as a circumstance pointing to guilt. *State v. Branch*, 155 M 22, 465 P 2d 821.

#### **Probable Cause for Information**

Evidence that accused was arrested in the company of one in whose car stolen property was found several hours later was not sufficient proof to justify filing of an information for burglary under former section 94-901. *State ex rel. Wilson v. District Court*, 159 M 439, 498 P 2d 1217.

#### **Proof of Entry**

Evidence that a tire and chains were taken from an automobile inside a barn, that a letter addressed to defendant was found next to automobile, and that part of the stolen property was found on defendant's premises, supported conviction under former section 94-901 for burglary of barn. *State v. Larson*, 75 M 274, 243 P 566.

#### **Sufficiency of the Evidence**

Evidence that defendant was flushed from hiding at 9:20 p.m., several hours after dark, that only preliminary work toward opening a safe had been completed and that a flashlight was among tools left behind at scene of burglary sufficiently established "nighttime requirement" to support conviction of first



degree burglary. *State v. Solis*, — M —, 516 P 2d 1157.

Evidence that defendants were driving car described by eyewitness as having been involved in a burglary, that defendant had a fresh cut on his arm and glass fragments in his shoes which matched broken glass at rear entrance of burglarized premises and that a footprint inside the premises matched the defendant's shoe was sufficient to support conviction of burglary. *State v. Black*, — M —, 516 P 2d 1163.

Search of defendant's premises which revealed a pistol matching the make, model and serial number of pistol reported stolen, a narcotics label with the pharmacy owner's initials, which labels were kept on the narcotics in the safe at the drug-store, and an attache case containing numerous drugs along with watches and cigarette lighters constituted sufficient evidence to sustain conviction of burglary of pharmacy. *State v. Watkins*, — M —, 518 P 2d 259.

Although mere possession of recently stolen property did not raise a presumption of guilt, where it was accompanied by other incriminating circumstances such as familiarity with the burglarized premises, unexplained possession of large sum of money, and fact that defendant suddenly left the state the day after the crime had been committed, there was sufficient evidence to support the conviction. *State v. Pepperling*, — M —, 533 P 2d 283.

#### Time of Entry

Under former sections 94-901 and 94-902, it was unnecessary to allege whether the entry was made at night or during the day, but it was for the jury to determine the degree of the offense. *State v. Copenhaver*, 35 M 342, 89 P 61; *State v. Mish*, 36 M 168, 92 P 459; *State v. Summers*, 107 M 34, 79 P 2d 560; *State ex rel. Williams v. Henry*, 119 M 271, 174 P 2d 220; *State ex rel. Wilson v. District Court*, 159 M 439, 498 P 2d 1217.

When, under former sections 94-901 and 94-902, the information specifically charged burglary in the nighttime but the prosecution failed to prove night as the time of entry, acquittal was required. *State v. Copenhaver*, 35 M 342, 89 P 61; *State v. Fitzpatrick*, 125 M 448, 239 P

2d 529, distinguished in 135 M 139, 144, 337 P 2d 924, 927.

Instruction as to second degree burglary under former section 94-902 was not required where all the evidence indicated entry during the night and there was not a scintilla of evidence indicating entry during the daytime. *State v. Dixon*, 80 M 181, 260 P 138.

#### Tools as Evidence

Tools found near the site of an attempted burglary were not admissible as evidence unless properly connected with the crime or the defendants, and it was error to permit a police officer to testify as to how the tools might be used in effecting entry. *State v. Filacchione*, 136 M 238, 347 P 2d 1000.

#### Unlawful Entry

Burglary under former section 94-901 required an entry that was a trespass, and the fact that intent to commit an unlawful act accompanied an entry that was otherwise lawful did not make it unlawful so as to support a conviction for burglary. *State v. Mish*, 36 M 168, 92 P 459; *State v. Starkweather*, 89 M 381, 297 P 497.

#### Value of Property

Since entry to commit petit larceny was within the scope of former section 94-901, it was unnecessary in a burglary prosecution to allege or prove value of the property it was intended to steal. *State v. Mish*, 36 M 168, 92 P 459.

Where property taken was described in testimony, jury could infer that it had some value, thus that its taking would be larceny and that unlawful entry with that intent was burglary under former section 94-901. *State v. Dixon*, 80 M 181, 260 P 138.

#### Variance between Pleadings and Proof

Entry and intent were the gravamen of the offense under former section 94-901, and it was immaterial that the information did not state the location of the building with exact particularity, that the property stolen actually belonged to a different person than named in the information, or that the proof related to a date eight days later than that specified in the information. *State v. Rogers*, 31 M 1, 77 P 293.

**94-6-205. Possession of burglary tools.** (1) A person commits the offense of possession of burglary tools when he knowingly possesses any key, tool, instrument, device, or any explosive, suitable for breaking into an occupied structure or vehicle or any depository designed for the safe-keeping of property, or any part thereof with the purpose to commit an offense therewith.

(2) A person convicted of possession of burglary tools shall be fined

not to exceed five hundred dollars (\$500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both.

**History:** En. 94-6-205 by Sec. 1, Ch. 513, L. 1973.

**Source:** Substantially the same as Illinois Criminal Code, Chapter 38, section 19-2.

#### Commission Comment

This section does not represent a substantial change from the old Montana law, R. C. M. 1947, section 94-908, which prohibited possession of burglary tools. The main purpose for the change is, first,

to reconstruct the language of the provision to conform with that of the other burglary statutes in this chapter, and second, to eliminate the concept of altering a tool or instrument for the purpose of committing a felony or misdemeanor, since possession of an altered instrument or tool with the intent to use it to commit a crime, cannot logically be distinguished from possession of an unaltered burglarious tool. The new provision does not alter the penalty for the crime.

## Part 3

### Theft and Related Offenses

#### 94-6-301. Repealed.

##### Repeal

Section 94-6-301 (Sec. 1, Ch. 513, L.

1973), relating to definitions, was repealed by Sec. 77, Ch. 359, Laws 1977.

**94-6-302. Theft.** (1) A person commits the offense of theft when he purposely or knowingly obtains or exerts unauthorized control over property of the owner and:

- (a) has the purpose of depriving the owner of the property;
- (b) purposely or knowingly uses, conceals, or abandons the property in such manner as to deprive the owner of the property; or
- (c) uses, conceals, or abandons the property knowing such use, concealment, or abandonment probably will deprive the owner of the property.

(2) A person commits the offense of theft when he purposely or knowingly obtains by threat or deception control over property of the owner and:

- (a) has the purpose of depriving the owner of the property;
- (b) purposely or knowingly uses, conceals, or abandons the property in such manner as to deprive the owner of the property; or
- (c) uses, conceals, or abandons the property knowing such use, concealment, or abandonment probably will deprive the owner of the property.

(3) A person commits the offense of theft when he purposely or knowingly obtains control over stolen property knowing the property to have been stolen by another and:

- (a) has the purpose of depriving the owner of the property;
- (b) purposely or knowingly uses, conceals, or abandons the property in such manner as to deprive the owner of the property; or
- (c) uses, conceals, or abandons the property knowing such use, concealment, or abandonment probably will deprive the owner of the property.

(4) A person convicted of the offense of theft of property not exceeding \$150 in value shall be fined not to exceed \$500 or be imprisoned in the county jail for any term not to exceed 6 months, or both. A person convicted of the offense of theft of property exceeding \$150 in value or theft



of any commonly domesticated hoofed animal shall be imprisoned in the state prison for any term not to exceed 10 years.

(5) Amounts involved in thefts committed pursuant to a common scheme or the same transaction, whether from the same person or several persons, may be aggregated in determining the value of the property.

**History:** En. 94-6-302 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 22, Ch. 359, L. 1977.

**Source:** Substantially the same as Illinois Criminal Code, Chapter 38, section 16-1.

#### Commission Comment

The first sentence of the section requires that the act must be done "knowingly" or "purposely." As is true in all except absolute liability offenses the act and the mental state must coincide. Therefore, the offense of theft is committed when any one of the acts coincides with any one of the mental states. After extended and exhaustive study and consideration by the commission, matching various combinations of the subsections to cover every type of conduct proscribed by the old law, and extending such matching to conduct covered by statutes in other states, it is believed that this section will cover any conceivable form of theft.

Subsection (1) is the most comprehensive and should include most if not all forms of theft.

Subdivision (1) (a) covers the traditional mental state required in theft. This mental state is the one which will be present in the great majority of cases. However, special situations may exist where it is difficult to prove a specific purpose to permanently deprive, but the offender's handling or disposition of the property is such that it directly results in a permanent deprivation to the owner, or would have so resulted but for the fortuitous intervention of circumstances of recovery. Subdivision (1) (c) is not intended to convert all "joy-riding" escapades into theft unless the abandonment of the vehicle is under such circumstances that the owner probably would be deprived permanently of the use or benefit of his car.

While the method by which unauthorized control is obtained or exerted is immaterial in subsection (1), and probably, in conjunction with one of the subdivisions (a), (b), or (c), would cover all forms of theft the commission felt that such an approach might be too concise,

and might create problems of application, in view of the large body of statutory material and the large number of offenses it is intended to replace. Therefore, subsections (2) and (3) were added, to cover the specific offenses of theft by threat or deceit and receipt of stolen property, although the commission intends that all forms of theft could be charged and proved under subsection (1).

#### Amendments

The 1977 amendment added subsection (5); and made minor changes in phraseology, punctuation and style.

#### Constitutionality

Because in Montana theft of livestock is a particularly serious problem, due to the large geographical area and the small population, the distinction in this section between theft of livestock and other theft has a rational basis and does not offend the equal protection clauses of the federal and state constitutions. *State v. Feeley*, — M —, 552 P 2d 66.

#### Criminal Intent

Proof that property was stolen property was not sufficient proof to support a conviction of theft or possession of stolen property since proof is also required of the specific intent of the defendant. *State v. Jimison*, — M —, 540 P 2d 315.

Where, after being asked to examine a stray horse for brands by the rancher into whose pasture it had wandered, defendant, after finding no markings, removed the horse and proceeded to sell it after making a number of representations of ownership, there was sufficient evidence to support a finding of the criminal intent necessary for commission of the crime. *State v. Feeley*, — M —, 552 P 2d 66.

#### Lesser Included Offenses

Where defendant was charged with stealing an automobile under this section, unauthorized use of a motor vehicle under section 94-6-305 is a lesser included offense. *State v. Shults*, — M —, 544 P 2d 817.

### DECISIONS UNDER FORMER LAW

#### Constitutionality

Former section 94-2721, which described the offense of receiving stolen property, was not unconstitutional in delegating to prosecuting attorney discretion to charge either misdemeanor or felony since the

defendant had to be charged with a felony and it was within the sound discretion of the court, after conviction, to determine punishment. *Petition of Gibson*, 153 M 454, 457 P 2d 767.

Former section 94-2721 dealing with re-



ceipt of stolen property was not unconstitutional as a denial of equal protection on theory it gave state the discretion to charge accused with either a felony or a misdemeanor under the same set of facts since prosecutor did not in fact have such discretion. *State v. Tritz*, 164 M 344, 522 P 2d 603, certiorari denied, 420 US 909, 42 L Ed 2d 838, 95 S Ct 828.

### Agency

Defendant who was sole owner of corporate collection agency which contracted to collect debts owed to corporate clients was an agent of the other corporations and was properly charged under subdivision 2 of former section 94-2701, when he did not pay over agreed portions of debts collected. *State v. Holdren*, 143 M 103, 387 P 2d 446.

### Attempts

Attempt to obtain money by false representations was complete when the representation was made and money solicited even though the representation was not believed and defendant did not actually receive any money. *State v. Phillips*, 36 M 112, 92 P 299.

### Bailment

An indictment charging the defendant with larceny as bailee under former section 94-2701 had to contain an averment of the bailment, but the particulars of the bailment need not be averred. *State v. Brown*, 38 M 309, 312, 99 P 954.

Where money was paid to defendant with understanding that he was to use the money for a particular purpose and to repay it by a certain date, defendant was a debtor rather than a bailee and his use of the money for other purposes and his failure to repay did not constitute larceny under former section 94-2701. *State v. Karri*, 51 M 157, 149 P 956.

Where purchaser of automobile gave check to a dealer in amount of purchase price from an out-of-state seller with understanding that the money would be forwarded to the seller, the dealer receiving the money was a bailee rather than a debtor and his failure to forward the money was larceny by bailee under former section 94-2701. *State v. Ahl*, 140 M 305, 371 P 2d 7.

### Continuous Series of Thefts

Where the evidence showed that defendant had a single purpose in the theft of numerous items over a period of time from the department store where she worked, and that the thefts must have occurred almost daily over a continuous period, the value of the items stolen could be aggregated to support a charge of grand larceny. *In re Jones*, 46 M 122, 126 P 929.

Information charging city water regis-

trar with embezzlement of water receipts over a period of time in numerous separate transactions did not charge more than one offense and was not duplicitous; state could charge one act of embezzlement when defendant failed to account at the end of his term even though a city ordinance required him to account daily. *State v. Kurth*, 105 M 260, 72 P 2d 687.

### Corporate Stock

Corporate officer who, without authority and with intent to deprive the corporation of its interest, issued a stock certificate in his own name, was guilty of larceny of the corporate shares under former section 94-2701. *State v. Letterman*, 88 M 244, 292 P 717.

Stock broker who received payment in full from a customer for a cash purchase but failed to order out stock in customer's name, using the stock instead to bolster its margin account with its correspondent, was guilty of larceny by bailee, at least where broker's account with correspondent did not include enough stock to meet demands of all its cash customers who were entitled to have the stock ordered out. *State v. Lake*, 99 M 128, 43 P 2d 627.

### Credit Extended

Act of bank officer in debiting dishonored draft to account of a customer rather than to his own account, thus concealing an overdraft in his own account, though a violation of the banking laws, was not larceny in violation of former section 94-2715 since no money was taken and the liability of the bank to its customer was not actually changed. *State v. Rarey*, 72 M 270, 233 P 615.

### Deception

Sending of telegram requesting money and signing of name of recipient's brother constituted a representation that the sender was the recipient's brother and was sufficient to support conviction for attempt to obtain money under false pretenses even though the sender used his own name, which was the same as the brother's. *State v. Phillips*, 36 M 112, 92 P 299.

In prosecution under former section 94-1806 for bunco or confidence game, it was not necessary to prove the falsity of every one of the pretenses making up an elaborate scheme to gain the victim's confidence. *State v. Moran*, 56 M 94, 182 P 110.

Evidence of representations of fact made to others than the complaining witness should not have been admitted, and reversal of conviction was required where these were the only false representations of fact proved. *State v. Bratton*, 56 M 563, 186 P 327.

Corporate officer could not be convicted for receiving money under false pretenses on the basis of payment of money to the corporation on the strength of misrepresentation of a sales agent of the corporation in the absence of evidence of a conspiracy or that the officer authorized or ratified the agent's misrepresentations. *State v. Woolsey*, 80 M 141, 259 P 826.

Conviction for obtaining property under false pretenses under former section 94-1805 did not require that the misrepresentations be such as would have deceived a person of ordinary caution and prudence; it was enough if they actually deceived the victim. *State v. Foot*, 100 M 33, 48 P 2d 1113.

Under former section 94-1805, information did not have to allege the very words of the pretenses or whether they were spoken or written. *State v. Foot*, 100 M 33, 48 P 2d 1113.

Defendant who induced the complaining witness to give him a valuable ring by saying that he had an oil well in Louisiana from which he received eight hundred dollars a month income and that he would cut her in for two hundred dollars of that income, should have been prosecuted under former section 94-1805 for obtaining money or property by false pretenses, rather than under former section 94-1806 for confidence game, where jury could assume that defendant's statements were false since the complaining witness received neither the first two hundred dollars nor any other payment. *State v. Allen*, 128 M 306, 275 P 2d 200.

### Degrees of Larceny

It was not necessary under former section 94-2701 to allege the degree of larceny, but that was for the jury to determine. *State v. Wiley*, 53 M 383, 164 P 84.

Use of term "feloniously" in justice court complaint charging defendant with offense of obtaining money by false pretenses was not reversible error where complaint specifically stated that offense charged was misdemeanor. *Petition of Brown*, 150 M 483, 436 P 2d 693.

### Description of Property

Information describing the property stolen as "five Ford wire wheels and tires" was sufficiently descriptive. *State v. Diamond*, 82 M 110, 265 P 5.

### Disposition of Stolen Property

Evidence that stolen horse had been found out of state was admissible as a link in the chain of evidence relating to a scheme in which defendant participated to ship horses under false bills of sale. *State v. Akers*, 106 M 43, 74 P 2d 1138.

### Entrapment

There was not such entrapment as to

invalidate a conviction where defendant approached sheep owner's employee with scheme to carry away sheep and employee co-operated with his employer's consent. *State v. Snider*, 111 M 310, 111 P 2d 1047.

### Fiduciary

A guardian who had given ample security to account for all funds coming into his hands and who was personally able to raise the amount thereof on demand, who temporarily employed guardianship funds to repay a loan under a misapprehension that he had a right to do so, thus technically appropriating them to his own use, could not nevertheless be adjudged guilty of larceny under former section 94-2715, especially where, at the settlement of the estate, he fully accounted for all moneys paid over to him as guardian. *Smith v. Smith*, 45 M 535, 125 P 987.

Bank which had received payment on government bond subscription and had purchased bond in its own name held the legal title to the bond as trustee for the subscriber, rather than as bailee, until the bond should be registered in the subscriber's name, and improper use of the bond as collateral on a loan was not larceny within the definition of former section 94-2701. *State v. Wallin*, 60 M 332, 199 P 285.

Secretary-treasurer of a corporation who, under a contract to sell treasury stock on a commission to be paid only when cash for the stock had been received, made fictitious sales, forged notes given in payment, manipulated the books so as to show him entitled to commissions and drew checks against the corporation's account for such commissions although not earned, committed larceny or embezzlement within the meaning of former section 94-2701, and his acts were covered by surety company's bond insuring against larceny or embezzlement. *Montana Auto Finance Corp. v. Federal Surety Co.*, 85 M 149, 278 P 116.

### Importation of Stolen Property

Under former section 94-2714, permitting prosecution for bringing stolen property into the state, the form of the accusation was intended to be the same as if the theft had occurred wholly within the state and the place of the theft was a matter of evidence. *State v. Willette*, 46 M 326, 127 P 1013, overruled on other grounds in *State v. Greeno*, 135 M 580, 592, 342 P 2d 1052.

### Indians

State district court was without jurisdiction to convict an Indian of larceny which occurred on Indian territory since under section 1153, Title 18, U. S. Code, such an offense is within the exclusive jurisdiction of the United States. *State v. Pepion*, 125 M 13, 230 P 2d 961.



### Intent

It was reversible error to omit from a jury instruction under former section 94-2701 the word "feloniously" or other language requiring a finding that the defendant had evil intent. *State v. Rechnitz*, 20 M 488, 52 P 264; *State v. Allen*, 34 M 403, 87 P 177; *State v. Peterson*, 36 M 109, 92 P 302.

Use of the word "feloniously" in an information sufficiently charged evil intent and it was not necessary to include an independent allegation as to intent. *State v. Allen*, 34 M 403, 87 P 177.

Instruction to jury requiring a finding that defendant had an intent to steal did not sufficiently state the requirement of a felonious or criminal intent. *State v. Peterson*, 36 M 109, 92 P 302.

Sheep herder did not, by receiving stolen sheep into his care without protest, incur criminal liability for receiving stolen property or become an accomplice to the theft, where he had no criminal intent and he quit his job and reported the incident to the sheriff at the first opportunity, so it was not necessary to corroborate his testimony. *State v. McComas*, 85 M 428, 278 P 993.

Delay in paying over state funds, with result that money was taken from defendant in an armed robbery, would not support conviction under subdivision 2 of former section 94-2701 without a showing of intent to deprive the state of its money permanently. *State v. McGuire*, 107 M 341, 88 P 2d 35.

Conviction for larceny under former section 94-2701 required proof of specific intent; it was error to give an instruction that "when an unlawful act is shown to have been deliberately committed for the purpose of injuring another, it is presumed to have been committed with a malicious and guilty intent. The law also presumes that a person intends the ordinary consequences of any voluntary act committed by him." *State v. Garney*, 122 M 491, 207 P 2d 506, distinguished in 135 M 139, 147, 337 P 2d 924, 929.

In prosecution for receiving stolen cow hides, evidence as to knowledge from brands on the hides was rebutted by evidence that when defendant purchased the hides they were so frozen that they could not be examined for brands, so that there was insufficient evidence to support conviction. *State v. Gilbert*, 126 M 171, 246 P 2d 814, overruled on other grounds in 156 M 456, 461, 481 P 2d 689.

In prosecution of county surveyor under former section 94-1805 for obtaining extra fees to which he was not entitled by presenting to the county a claim under another name, testimony that a state examining officer advised defendant to

handle the matter in this manner was admissible to show good faith and absence of the requisite criminal intent. *State v. Hale*, 126 M 326, 249 P 2d 495.

Requisite intent to deprive owner of property permanently was not shown where proceeds of sale of complainants' property were received by defendant's corporation and credited to running account with complainants even though defendant delayed in settling and eventually became insolvent, resulting in loss to complainants. *State v. Smith*, 135 M 18, 334 P 2d 1099.

### Lesser Included Offenses

In prosecution for obtaining money under false pretenses under former section 94-1805, defendant was not entitled to instructions on lesser and included offenses in former section 90-620 on sale of packaged commodities or in former section 94-1904 on full weight in sale of certain commodities, since both of those sections required a sale and section 94-1805 did not. *State v. Lagerquist*, 152 M 21, 445 P 2d 910.

### Livestock

Subdivision 3 of former section 94-2704, declaring the theft of a heifer grand larceny regardless of value, referred to live animals only, but where defendants were caught carrying away carcasses of heifers which had been previously killed, dressed and hidden, circumstantial evidence could be used to show that defendants had previously killed the heifers. *State v. Keeland*, 39 M 506, 104 P 513, distinguished in 138 M 362, 357 P 2d 19.

Since, under former section 94-2704, theft of a calf was grand larceny regardless of value, it was not necessary for the jury to make a finding as to value in such a case. *State v. Ingersoll*, 88 M 126, 292 P 250.

Defendant who dressed a stolen cow and assisted the killers in disposing of it could be convicted of grand larceny under subdivision 3 of former section 94-2704, regardless of value, even though defendant did not know of the theft until the cow was already dead. *State v. Guay*, 138 M 362, 357 P 2d 19.

Subdivision 3 of former section 94-2704 made theft of each head of livestock a separate offense, and there was no prejudice in dividing information into five counts, each alleging theft of different cattle where there were differences in the manner of proving the thefts and differences in ownership. *State v. Johnson*, 149 M 173, 424 P 2d 728.

### Obtaining Control

Evidence that defendant made false representations and exchanged bank draft



in amount of \$800 for victim's car when defendant had only \$300 in bank was sufficient to sustain conviction for obtaining property by false pretenses under former section 94-1805, where defendant obtained possession even though victim never transferred title to defendant. *State v. Love*, 151 M 190, 440 P 2d 275.

Under former section 94-1805, money received in form of check payable to defendant's wife was money received by defendant in light of evidence that family was living together, that money was used for household support of family and that defendant's wife acted in secretarial capacity in defendant's business operations; fact that defendant did not receive check made out to him personally did mean that element of crime of obtaining money by false pretenses had not been established. *State v. Lagerquist*, 152 M 21, 445 P 2d 910.

#### Other Offenses

In prosecution of county officer under former section 94-1805 for obtaining money under false pretenses in collecting illegal fees by presenting a claim under the name of another party for work which was within his duties as county surveyor, it was prejudicial error for the court to admit evidence of another claim submitted by the county surveyor which offense was not charged in the information. *State v. Hale*, 126 M 326, 249 P 2d 495.

#### Overlapping Statutes

Act which constituted violation of weights and measures statute and another statute relating to sale of specific commodities, both of which were misdemeanors, still could be punished as a felony when it constituted obtaining money under false pretenses under former section 94-1805; the state had the discretion to prosecute under any of the statutes. *State v. Lagerquist*, 152 M 21, 445 P 2d 910.

Fact that defendant charged with obtaining money by false pretenses under former section 94-1805 might instead have been charged with a misdemeanor under former section 94-2702, the bad-check statute, did not prevent his conviction under section 94-1805; a person may have been guilty of violating more than one section by the same act. *State v. Evans*, 153 M 303, 456 P 2d 842.

Conviction under federal law for making false statements in connection with federal research grant funds did not bar prosecution for embezzlement of state funds under state law, since defendant had received grants from both state and federal sources, and the university had kept separate accounts for each grant. *State ex rel. Zimmerman v. District Court*, — M —, 541 P 2d 1215.

#### Ownership of Property

Where information for receiving stolen property in violation of former section 94-2721 alleged ownership of the property jointly by three persons but the evidence showed ownership of particular items by the three named persons individually, there was a fatal variance between allegations and proof. *State v. Moxley*, 41 M 402, 110 P 83, distinguished in 146 M 188, 202, 405 P 2d 642.

Particular ownership of property is not of the essence of the crime of larceny and allegations of ownership are descriptive only, so that even though the information alleged larceny of partnership property, it was not necessary to make technical proof of a partnership. *State v. Grimsley*, 96 M 327, 30 P 2d 85.

Allegations of ownership are descriptive only and, in the case of livestock, may be proved other than by recorded brands; unrecorded brands served as descriptive of the animal. *State v. Akers*, 106 M 43, 74 P 2d 1128.

Instruction that if the jury should find that a cow allegedly stolen was the property of the prosecuting witness, and "if there is no evidence of ownership in any other person" they could conclude that the ownership remained in him, was not open to objection that it assumed that there was no other evidence as to ownership, the court, by the quoted words, having expressly recognized the possibility of evidence that ownership was in another who sold to defendant. *State v. Rossell*, 113 M 457, 462, 127 P 2d 379.

It was not essential that an information for obtaining property under false pretenses under former section 94-1805 contain an allegation of ownership; lawful possession was all that was necessary and the section did not require that money or property belong to the person defrauded. *State v. Hanks*, 116 M 399, 153 P 2d 220.

In prosecution under former section 94-2721 on information alleging receipt of a stolen freezer the property of a county, proof of ownership by the county was required and where the purchase was unlawful, the county never owned the freezer so there was a failure of proof. *State v. Bourdeau*, 126 M 266, 246 P 2d 1037.

Information against agent of a distributor for larceny of money belonging both to the distributor and a manufacturer was not required to set out with particularity the amount belonging to each. *State v. Fairburn*, 135 M 449, 340 P 2d 157.

In prosecution on information alleging taking from a named owner, there was no fatal variance in proof that the property was taken from the possession of a lessee of the named owner. *State v. Rindal*, 146 M 64, 404 P 2d 327.

Information alleging receipt of stolen property whose ownership was unknown was sufficient where the property was described with sufficient particularity to apprise the defendant of the crime charged and to protect him from double jeopardy. *State v. Peters*, 146 M 188, 405 P 2d 642.

### Receiving Stolen Property

In a prosecution for larceny under former section 94-2701, where jury could have found on the evidence that defendant, though he received stolen property, was not a party to the original theft, defendant was entitled to an instruction distinguishing between the offenses and directing acquittal on the larceny charge if defendant was not a party to the original theft. *State v. Rechnitz*, 20 M 488, 52 P 264.

Where two persons conspired, one to steal property and the other to receive the property, the thief was an accomplice to the offense of receiving stolen property and his testimony had to be corroborated for conviction of his coconspirator. *State v. Keithley*, 83 M 177, 271 P 449.

State courts had jurisdiction of charge of receiving stolen property even though the property belonged to the federal government so that receiving it was a violation of section 101, Title 18, U.S. Code and was also triable by the federal courts. *Ex parte Groom*, 87 M 377, 287 P 638.

One who after the crime of larceny was completed, being present, aided and abetted others in receiving the stolen property, with knowledge that it was stolen and either for his own gain or with intent to prevent the owner from again possessing the property, was a principal in the distinct crime of receiving stolen property and was properly prosecuted as such. *State v. Huffman*, 89 M 194, 296 P 789.

In a prosecution for receiving stolen property under former section 94-2721, a distinct statutory offense, knowledge on the part of the defendant that property was stolen when he received it was essential for conviction. *State v. Keays*, 97 M 404, 34 P 2d 855.

An accessory before the fact of theft could still be guilty of receiving the property and it was optional with the state to prosecute the offender for either. *State v. Webber*, 112 M 284, 116 P 2d 679.

In the absence of a conspiracy, the thief is not generally an accomplice to the crime of receiving stolen property, so his testimony does not require corroboration. *State v. Mercer*, 114 M 142, 133 P 2d 358.

Where defendant's first knowledge as to particular stolen property was received after the property had already been stolen,

he was not made an accomplice to the theft by his act of buying the property, and the fact that defendant may have purchased other stolen merchandise from the same thief previously did not constitute an offer to buy such merchandise in the future so as to make him an accomplice, especially where the thief had sold stolen merchandise to others in the past, so the thief's testimony in a prosecution for receiving stolen property did not require corroboration. *State v. Mercer*, 114 M 142, 133 P 2d 358.

Under former section 94-2721, state was not required to prove theft by someone other than defendant to establish defendant as receiver of stolen property. *State v. Watkins*, 156 M 456, 481 P 2d 689, overruling *State v. Gilbert*, 126 M 171, 246 P 2d 814.

### State as Victim of Crime

By virtue of former section 94-105, which included bodies politic among those entities which one could criminally intend to defraud, the crimes of grand larceny and obtaining money by false pretenses, as defined by former sections 94-2701 and 94-1805, respectively, could be committed against the state, since the gravamen of each offense was to defraud the true owner of his, or its, property. *State v. Cline*, — M —, 555 P 2d 724.

### Value of Property

Where three different persons all paid money to defendant at the same time for similar purposes, and defendant appropriated the money at the same time without carrying out the purposes, defendant could be informed against for a single act of larceny and the amounts could be combined to charge him with grand larceny. *State v. Mjelde*, 29 M 490, 75 P 87.

In prosecution under former section 94-2721 for receiving stolen property, value of the property made no difference in the penalty and an allegation of value in the information was surplusage, so that it was necessary on trial only to prove some value, not the amount alleged. *State v. Moxley*, 41 M 402, 110 P 83.

Value of numerous items stolen over a period of time by employee of a department store could be aggregated to support a charge of grand larceny where the evidence showed that defendant had a single purpose in the thefts and that they must have occurred almost daily over a continuous period. *In re Jones*, 46 M 122, 126 P 929.

Evidence that property stolen had some substantial value supported conviction for petit larceny. *State v. Dimond*, 82 M 110, 265 P 5.

### Variance of Proof

Where the information charged theft



of corporate stock by misappropriation by a bailee or agent, but the evidence, including endorsement of the certificate by the owner and subscription to stock of a new corporation, showed that the crime, if any, was obtaining property by false pretenses, there was a fatal variance between the charge and the proof. *State v. Lund*, 93 M 169, 18 P 2d 603, distinguished in 146 M 64, 71, 404 P 2d 327, 331.

Where, in prosecution of a city water registrar for embezzling funds received by him for the city, the state filed a bill of particulars listing 214 items of receipts

not accounted for, the state could still introduce evidence of other amounts received during the period as a part of the proof that the total amount reported was short of the total amount received. *State v. Kurth*, 105 M 260, 72 P 2d 687.

On prosecution of information charging larceny by taking of property, evidence that defendant secreted the property was admissible to show criminal intent in the taking even though secreting was a separate offense under subdivision 1 of former section 94-2701. *State v. Rindal*, 146 M 64, 404 P 2d 327.

**94-6-303. Theft of lost or mislaid property.** (1) A person who obtains control over lost or mislaid property commits the offense of theft when he:

(a) knows or learns the identity of the owner or knows, or is aware of, or learns of a reasonable method of identifying the owner; and

(b) fails to take reasonable measures to restore the property to the owner; and

(c) has the purpose of depriving the owner permanently of the use or benefit of the property.

(2) A person convicted of theft of lost or mislaid property shall be fined not to exceed five hundred dollars (\$500) or be imprisoned in the county jail for a period not to exceed six (6) months.

**History:** En. 94-6-303 by Sec. 1, Ch. 513, L. 1973.

**Source:** Identical to Illinois Criminal Code, Chapter 38, section 16-2.

#### Commission Comment

Subsection (a) provides for the case in which the owner is known or there is a "clue" to his identity. The "clue" provision is designed to eliminate the distinction

between lost property and property which has merely been mislaid based on the assertion that in all "mislaid" property cases there is a clue to ownership. Subsection (b) requires only that reasonable measures to restore the property be taken. Subsection (c) specifies the traditional mental state in theft, i.e., to deprive permanently. The three subsections must coincide before the offense is committed.

#### DECISIONS UNDER FORMER LAW

##### Attempt to Restore

Where ranch hand changed brand on range livestock and rancher, when he learned of it, attempted to find true

owner and make amends but was arrested before he could do so, rancher was not guilty of larceny. *State v. McClain*, 76 M 351, 246 P 956.

**94-6-304. Theft of labor or services or use of property.** (1) A person commits the offense of theft when he obtains the temporary use of property, labor or services of another which are available only for hire, by means of threat or deception or knowing that such use is without the consent of the person providing the property, labor or services.

(2) A person convicted of theft of labor or services or use of property shall be fined not to exceed five hundred dollars (\$500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both.



**History:** En. 94-6-304 by Sec. 1, Ch. 513, L. 1973.

**Source:** Substantially the same as Illinois Criminal Code, Chapter 38, section 16-3.

#### Commission Comment

This section is a slight variation of the traditional requirement of theft found in section 94-6-302 which requires permanent deprivation. In this section a temporary taking will suffice to complete the offense.

### DECISIONS UNDER FORMER LAW

#### Restoration of Property

Bank's temporary use of bond to which it held legal title as trustee for a subscriber as collateral to secure a loan to the bank was not, under former section 94-2717, larceny without an intent to de-

prive the owner permanently of his property and where the bond was in fact restored before demand for it or before information filed. *State v. Wallin*, 60 M 332, 199 P 285.

#### 94-6-304.1. Obtaining communication services with intent to defraud.

In a prosecution under section 94-6-304 for theft of telephone, telegraph, or cable television services, the element of deception is established by proof that the defendant obtained such services by any of the following means:

- (1) by use of a code, prearranged scheme, or other similar stratagem or device whereby said person, in effect, sends or receives information; or
- (2) by installing, rearranging, or tampering with any facilities or equipment, whether physically, inductively, acoustically, electronically; or
- (3) by any other trick, stratagem, impersonation, false pretense, false representation, false statement, contrivance, device, or means; or
- (4) by making, assembling, or possessing any instrument, apparatus, equipment or device, or the plans or instructions for the making or assembling of any instrument, apparatus, equipment or device which is designed, adapted or otherwise intended to be used to avoid the lawful charge, in whole or in part, for any telecommunications service by concealing the existence or place of origin or destination of any telecommunications.

**History:** En. 94-6-304.1 by Sec. 1, Ch. 156, L. 1974; amd. Sec. 1, Ch. 175, L. 1977.

#### Title of Act

An act relating to obtaining communication services with intent to defraud.

#### Amendments

The 1977 amendment deleted subdivision 5, which prohibited aiding in the avoidance of lawful telecommunication charges; and made minor changes in punctuation and style. For analogous current provisions, see 94-6-304.2.

**94-6-304.2. Aiding the avoidance of telecommunications charges.** (1) A person commits the offense of aiding the avoidance of telecommunications charges when he:

- (a) publishes the number or code of an existing, canceled, revoked, expired, or nonexistent credit card or the numbering or coding which is employed in the issuance of credit cards with the purpose that it will be used to avoid the payment of lawful telecommunications charges; or
- (b) publishes, advertises, sells, gives, or otherwise transfers to another plans or instructions for the making or assembling of any apparatus, instrument, equipment, or device described in 94-6-304.1(4) with the purpose that such will be used or with the knowledge or reason to believe that such will be used to avoid the payment of lawful telecommunication charges.

- (2) A person convicted of the offense of aiding the avoidance of tele-

communications charges shall be fined not to exceed \$500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

(3) For the purposes of this section, the term "publish" means to communicate information to any one or more persons, either orally; in person; by telephone, radio, or television; or in a writing of any kind, including but not limited to a letter, memorandum, circular, handbill, newspaper or magazine article, or book.

**History:** En. 94-6-304.2 by Sec. 2, Ch. 175, L. 1977.

#### **Title of Act**

An act to define the offense of aiding the avoidance of telecommunications charges; amending section 94-6-304.1, R.C.M. 1947.

**94-6-305. Unauthorized use of motor vehicles.** (1) A person commits the offense of unauthorized use of motor vehicles if he knowingly operates the automobile, airplane, motorcycle, motorboat, or other motor-propelled vehicle of another without his consent.

(2) A person convicted of unauthorized use of motor vehicles shall be fined not to exceed five hundred dollars (\$500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both. It is an affirmative defense that the offender reasonably believed that the owner would have consented to the operation had he known of it.

**History:** En. 94-6-305 by Sec. 1, Ch. 513, L. 1973.

**Source:** Substantially the same as Model Penal Code, section 223-9.

poses, because larcenous intent was usually found to be absent. This section is intended to deal with that problem.

#### **Commission Comment**

Common-law larceny did not cover the use of an auto for purposes of a joyride, or where the bailee of a vehicle or animal used the bailed chattel for his own pur-

#### **Lesser Included Offense**

Where an automobile is taken, the offense described in this section is a lesser included offense within the crime of theft, section 94-6-302. *State v. Shults*, — M —, 544 P 2d 817.

### **DECISIONS UNDER FORMER LAW**

#### **Amendment of Information**

Where first information charged violation of former section 94-3305, unauthorized use of vehicle, and second information, based on same taking, charged grand larceny in violation of former section 94-2701, the second information was in effect an amendment of the first information and

might have been objected to because filed after arraignment on the first information; however, defendant waived his objection by pleading to the second information and moving to dismiss the first. *Gransberry v. State*, 149 M 158, 423 P 2d 853.

**94-6-306. Offender's interest in the property.** (1) It is no defense to a charge of theft of property that the offender has an interest therein, when the owner also has an interest to which the offender is not entitled.

(2) It is no defense that theft was from the offender's spouse, except that misappropriation of household and personal effects, or other property normally accessible to both spouses, is theft only if it occurs after the parties have ceased living together.

**History:** En. 94-6-306 by Sec. 1, Ch. 513, L. 1973.

**Source:** Substantially the same as Illinois Criminal Code, Chapter 38, section 16-4.

**Commission Comment**

Subsection (1) is substantially the same as Model Penal Code, Tent. Draft No. 2, § 206-11(1), (See comment, p. 100). The provision removes any doubt regarding the commission of theft by a co-owner, such as a partner, joint tenant or tenant in common, or any other type of co-owner who exercises unauthorized control with the purpose to permanently deprive a co-owner of his interest in the property.

Subsection (2) recognizes that unless the husband and wife have separated and are living in separate abodes when the

supposed theft occurs the criminal law should not intrude into what usually is a civil fight over property, the true ownership of which is dubious at best. The divorce court should be better informed regarding the relationship between the parties and should determine the proper distribution of the property. If, however, the parties have separated and are living in separate abodes and theft occurs, there seems to be no good reason why such conduct should not be punished in the Criminal Code.

**DECISIONS UNDER FORMER LAW****Claim of Interest**

Evidence of statements made by defendant indicating his intention to retain money due his principal as a means of protecting his own supposed claim against principal was inadmissible as hearsay and self-serving. *State v. Fairburn*, 135 M 449, 340 P 2d 157.

**Partnership Property**

Where, under an agreement to form a partnership, one party gave money to the other for the purposes of the partnership, the one receiving money was merely a bailee until such time as the partnership had actually been formed, and misappropriation of the money by the bailee fell within the definition of larceny in former section 94-2701 despite the fact that a partner could not embezzle partnership property. *State v. Brown*, 38 M 309, 99 P 954.

**Restitution**

Restoration of property was not available under former section 94-2717 as a defense to the crime of uttering fraudulent checks where no restitution on any of the counts had been made until after the informations had been filed against the defendant. *State v. Skinner*, — M —, 515 P 2d 81.

**94-6-307. Deceptive practices.** (1) A person commits the offense of deceptive practices when he purposely or knowingly:

(a) causes another, by deception or threat, to execute a document disposing of property or a document by which a pecuniary obligation is incurred;

(b) makes or directs another to make a false or deceptive statement addressed to the public or any person for the purpose of promoting or procuring the sale of property or services;

(c) makes or directs another to make a false or deceptive statement to any person respecting his financial condition for the purpose of procuring a loan or credit or accepts a false or deceptive statement from any person who is attempting to procure a loan or credit regarding that person's financial condition; or

(d) obtains or attempts to obtain property, labor, or services by any of the following means:

(i) using a credit card which was issued to another, without the other's consent;

(ii) using a credit card that has been revoked or canceled;

(iii) using a credit card that has been falsely made, counterfeited, or altered in any material respect;

(iv) using the pretended number or description of a fictitious credit card;



(v) using a credit card which has expired provided the credit card clearly indicates the expiration date.

(2) A person convicted of the offense of deceptive practices shall be fined not to exceed \$500 or imprisoned in the county jail for a term not to exceed 6 months, or both. If the deceptive practices are part of a common scheme or the value of any property, labor, or services obtained or attempted to be obtained exceeds \$150, the offender shall be imprisoned in the state prison for a term not to exceed 10 years.

**History:** En. 94-6-307 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 23, Ch. 359, L. 1977.

**Source:** Substantially the same as Illinois Criminal Code, Chapter 38, section 17-1.

#### Commission Comment

This section supplements section 94-6-302(2)(b). Most outright swindles with no pretext of legitimacy will fall within section 94-6-302(2) and be prosecuted thereunder because of the greater penalty. Section 94-6-307 is designed to cover a greater variety of deceptive practices than were formerly proscribed by Montana law (See Title 94, chapter 18, which contains such offenses as: obtaining property or services by false pretenses; confidence games; sale without consent of holder; deception in the sale of land; etc.; and chapter 21,

fraudulent conveyances.) See also R. C. M. 1947, section 94-1803 (False statement respecting financial condition) and section 94-35-256 (Workmen—false representation to procure punishable.)

The four (4) subsections of this section are intended to cover deceptive practices which might not fall under the prohibition of section 94-6-302, Theft.

#### Amendments

The 1977 amendment deleted "or knowingly accepts" after "make" in subsection (1)(c); added "or accepts a false or deceptive statement from any person who is attempting to procure a loan or credit regarding that person's financial condition" to subsection (1)(c); and made minor changes in phraseology, punctuation and style.

### DECISIONS UNDER FORMER LAW

#### False Financial Statement

Defendant who obtained a bank loan by misrepresenting his ownership of ranch land, livestock and feed, was guilty of obtaining property under false pretenses under former section 94-1805, and it did not matter that the bank credited defendant's account rather than paying him money directly. *State v. Mason*, 62 M 180, 204 P 358.

Defendant who induced the complaining witness to give him a ring by saying that he had an oil well in Louisiana from which he received \$800 a month income and that he would cut her in for \$200 of that income should have been prosecuted under former section 94-1805 for "obtaining

money or property by false pretenses," rather than for confidence game under former section 94-1806, where jury could assume that defendant's statements were false since the complaining witness received neither the first \$200 nor any other payment. *State v. Allen*, 128 M 306, 275 P 2d 200.

#### Promissory Note

It was doubtful whether inducing another to execute a promissory note was defrauding of property within the meaning of former section 94-1805, which covered obtaining property under false pretenses. *State v. Bratton*, 56 M 563, 186 P 327.

**94-6-308. Deceptive business practices.** (1) A person commits the offense of deceptive business practices if in the course of engaging in a business, occupation, or profession he purposely or knowingly:

- (a) uses or possesses for use a false weight or measure, or any other device for falsely determining or recording any quality or quantity; or
- (b) sells, offers, or exposes for sale, or delivers less than the represented quantity of any commodity or service; or

(c) takes or attempts to take more than the represented quantity of any commodity or service when as buyer he furnished the weight or measure; or

- (d) sells, offers or exposes for sale adulterated commodities; or
- (e) sells, offers or exposes for sale mislabeled commodities; or
- (f) makes a deceptive statement regarding the quantity or price of goods in any advertisement addressed to the public.

(2) "Adulterated" means varying from the standard of composition or quality prescribed by statute or lawfully promulgated administrative regulation, or if none, as set by established commercial usage.

(3) "Mislabeled" means:

(a) varying from the standard of truth or disclosure in labeling prescribed by statute or lawfully promulgated administrative regulation, or if none, as set by established commercial usage; or

(b) represented as being another person's produce, though otherwise labeled accurately as to quality and quantity.

(4) A person convicted of the offense of deceptive business practices shall be fined not to exceed five hundred dollars (\$500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both.

**History:** En. 94-6-308 by Sec. 1, Ch. 513, L. 1973.

**Source:** Substantially the same as the proposed Michigan Code, section 4105.

#### **Commission Comment**

This section replaces a large number of statutes in the old code which provided

for the content of goods, marks which they are to bear and the use of false weights and measures. The purpose of this section is to provide a single, simple definition for false weights and measures, short weight sales and purchases, adulteration, mislabeling of commodities, and false advertising.

### **DECISIONS UNDER FORMER LAW**

#### **False Weights**

An act which constituted a misdemeanor under former section 90-602, the weights and measures statute, and at the same time a felony under former section 94-1805, the false pretenses statute, could be prosecuted under either in the state's dis-

cretion, and when it was prosecuted as a felony, defendant was not entitled to an instruction on the other offense as a lesser and included offense since former section 90-602 required a sale but section 94-1805 did not. *State v. Lagerquist*, 152 M 21, 445 P 2d 910.

#### **94-6-308.1. Chain distributor schemes.** (1) As used in this section:

(a) "person" means a natural person, corporation, partnership, trust, or other entity; and in the case of an entity it shall include any other entity which has a majority interest in such entity or effectively controls such other entity as well as the individual officers, directors, and other persons in act of control of the activities of each entity;

(b) "chain distributor scheme" means a sales device whereby a person, under a condition that he make an investment, is granted a license or right to recruit for consideration one or more additional persons who are also granted such license or right upon condition of making an investment and may further perpetuate the chain of persons who are granted such license or right upon such condition.

(2) It is unlawful for any person to promote, sell, or encourage participation in any chain distributor scheme.

(3) Any person violating the provisions of this section shall, upon



conviction, be imprisoned in the state prison for a period not to exceed 1 year, or fined not to exceed \$1,000, or both.

(4) Any person convicted of a second offense under this section shall be imprisoned in the state prison for a period not to exceed 5 years or fined not to exceed \$5,000, or both.

**History:** En. Secs. 1 to 3, Ch. 465, L. 1973; R. C. M. 1947, Supp., Secs. 94-1832 to 94-1834; amd. Sec. 24, Ch. 359, L. 1977.

#### Compiler's Note

This section was not part of the Criminal Code of 1973 but is derived from a separate 1973 act. The compiler has placed the section here in the interest of orderly arrangement and has inserted subsection and subdivision designations in the same style as in the Criminal Code.

#### Title of Act

An act prohibiting the use of chain distributor schemes; and providing a penalty.

#### Amendments

The 1977 amendment deleted a provision in subsection (3) that a person violating this section be deemed guilty of a felony; and made minor changes in phraseology, punctuation and style.

**94-6-309. Issuing a bad check.** (1) A person commits the offense of issuing a bad check when, with the purpose of obtaining control over property or to secure property, labor or services of another, he issues or delivers a check or other order upon a real or fictitious depository for the payment of money, knowing that it will not be paid by the depository.

(2) If the offender has an account with the depository, failure to make good the check or other order within five (5) days after written notice of nonpayment has been received by the issuer is prima facie evidence that he knew that it would not be paid by the depository.

(3) A person convicted of issuing a bad check shall be fined not to exceed five hundred dollars (\$500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both. If the offender has engaged in issuing bad checks which are part of a common scheme, or if the value of any property, labor or services obtained, or attempted to be obtained exceeds one hundred fifty dollars (\$150), he shall be imprisoned in the state prison for any term not to exceed ten (10) years.

**History:** En. 94-6-309 by Sec. 1, Ch. 513, L. 1973.

**Source:** Derived from Illinois Criminal Code, Chapter 38, section 17-1(d).

#### Commission Comment

Bad check laws, in addition to eliminating the doubt as to liability on false promises, accomplish two other things which seem worth preserving: (a) they eliminate the requirement of proof of obtaining property by means of false pretense; and (b) they create a presumption of knowledge that the check would not be paid under certain circumstances. The

presumption of knowledge is probably the most important practical reason for maintaining special bad check provisions. In the fictitious account case it is possible but highly improbable that the transaction was innocent; the drawer may absent-mindedly have put the name of the wrong bank on a blank check, or he may have intended to open an account before the check was presented. In the case of checks on real but inadequate accounts, the chance of innocent miscalculation by the drawer is much greater but is negated by a refusal to make the check good.

### DECISIONS UNDER FORMER LAW

#### False Pretenses

Fact that defendant might have been charged with a misdemeanor under the fraudulent check statute did not prevent his conviction of felony under former sec-

tion 94-1805, the false pretense section; a person may be guilty of violating two statutes by the same act. *State v. Evans*, 153 M 303, 456 P 2d 842.



**Fictitious Account**

The offense was complete when defendant passed a check, knowing that no one by the name signed as maker had an account with the bank, and it was no defense that defendant had no notice of nonpayment or that he later made restitution. *State v. Johnston*, 140 M 111, 367 P 2d 891.

**Five-day Notice Provision**

In prosecution under former section 94-2702, trial court did not err in refusing to instruct jury there could be no conviction in absence of any showing that the five-day notice specified in the statute had been given; five-day notice provision was created by legislature in order to obviate necessity of proving defendant's intent to defraud and knowledge of insufficient funds and provided only an alternative method of establishing a prima facie case and was therefore only a rule of evidence and not essential to the establishment of the crime. *State v. Skinner*, — M —, 515 P 2d 81.

**Other Offenses**

In prosecution for uttering and delivering a fraudulent check under former section 94-2702, evidence was properly re-

ceived as to other checks drawn on prior occasions on banks in which defendant had no account as such testimony tended to show defendant's intent to defraud. *State v. Tully*, 148 M 166, 418 P 2d 549.

**Postdated Check**

Defendant who gave a postdated check, stating honestly that he did not then have sufficient funds but that the bank would honor the check by the time of its date, did not misrepresent present facts but merely made a promise as to the future; this did not constitute a violation of former section 94-2702, the fraudulent check law, even though the check was dishonored when presented. *State v. Patterson*, 75 M 315, 243 P 355.

**Restitution**

The crime of uttering fraudulent checks under former section 94-2702 was one of the crimes of larceny under former section 94-2717 to which restoration of property was a defense; however, the defense was not available where no restitution on any of the counts had been made until after the informations had been filed against defendant. *State v. Skinner*, — M —, 515 P 2d 81.

**94-6-310. Forgery.** (1) A person commits the offense of forgery when, with purpose to defraud, he knowingly:

(a) without authority makes or alters any document or other object apparently capable of being used to defraud another in such manner that it purports to have been made by another or at another time, or with different provisions, or of different composition; or

(b) issues or delivers such document or other object knowing it to have been thus made or altered; or

(c) possesses with the purpose of issuing or delivering any such document or other object knowing it to have been thus made or altered; or

(d) possesses with knowledge of its character any plate, die, or other device, apparatus, equipment or article specifically designed for use in counterfeiting or otherwise forging written instruments.

(2) A purpose to defraud means the purpose of causing another to assume, create, transfer, alter or terminate any right, obligation or power with reference to any person or property.

(3) A document or other object capable of being used to defraud another includes, but is not limited to, one by which any right, obligation, or power with reference to any person or property may be created, transferred, altered or terminated.

(4) A person convicted of the offense of forgery shall be fined not to exceed five hundred dollars (\$500) or be imprisoned in the county jail for any term not to exceed six (6) months or both. If the forgery is part

of a common scheme or if the value of the property, labor or services obtained or attempted to be obtained, exceeds one hundred fifty dollars (\$150) the offender shall be imprisoned in the state prison for any term not to exceed twenty (20) years.

**History:** En. 94-6-310 by Sec. 1, Ch. 513, L. 1973.

**Source:** Substantially the same as Illinois Criminal Code, Chapter 38, section 17-3.

#### **Commission Comment**

There is doubt that a specific forgery law is necessary because the provisions dealing with false pretense and fraud

should be adequate to cover forgery. Forgery is retained as a distinct offense partly because the concept is so embedded in popular understanding that it would be unlikely that any legislature would completely abandon it, and partially in recognition of the special effectiveness of forgery as a means of undermining public confidence in important symbols of commerce, perpetrating large scale frauds.

### **DECISIONS UNDER FORMER LAW**

#### **Accomplices**

Making a false endorsement and passing the instrument with knowledge of the falsity of the endorsement are separate offenses, and the person who makes the endorsement is not necessarily an accomplice to the offense of passing it, so that his testimony did not require corroboration as would that of an accomplice. *State v. Phillips*, 127 M 381, 264 P 2d 1009.

#### **Alteration of Document**

Information alleging alteration of a document in violation of former section 94-2001 was required to set forth the particulars of the alteration since not every alteration but only material alterations are in violation. *State v. Mitten*, 36 M 376, 92 P 969.

Where information alleged forgery by making of a document but not by alteration, it was prejudicial error to give an instruction on alteration. *State v. Mitten*, 36 M 376, 92 P 969.

Severance of a promissory note from a purchase order, thus making the note negotiable instead of nonnegotiable, constituted such material alteration of the instrument as to constitute forgery within the meaning of former section 94-2001. *State v. Mitton*, 37 M 366, 96 P 926, explained in 52 M 359, 365, 157 P 951, 953.

Information charging that defendant knowingly passed a forged instrument need not specify the means by which the forgery was done, and evidence that defendant knew the instrument had been altered supported the allegation. *State v. Mitton*, 37 M 366, 96 P 926.

#### **Apparatus for Counterfeiting**

Information charging possession of "apparatus, paper and other things" for use in counterfeiting was sufficient under former section 94-2011, and it was not necessary that the apparatus be described with

greater particularity. *State v. Shannon*, 95 M 280, 26 P 2d 360, overruled on other grounds in 125 M 566, 589, 242 P 2d 477, 488.

#### **Authority to Sign Document**

Bank officers who were authorized to issue travelers' checks, on condition that they collect and remit the amount thereof to the drawee bank, did not commit forgery in issuing such checks without collecting or remitting the amount. *State v. Alexander*, 73 M 329, 236 P 542.

Where executor of estate signed blank checks on the estate's account and authorized attorney to use them by filling in names of creditors and distributees of the estate, attorney's unauthorized filling in of his own name or that of his creditor constituted forgery within the meaning of former section 94-2011. *State v. Daems*, 97 M 486, 37 P 2d 322.

#### **Document Forged or Counterfeited**

There was no violation of former section 94-2001 where the instrument forged did not purport to impose any liability on the purported maker but merely directed the addressee to charge an advance to the defendant's account. *State v. Evans*, 15 M 539, 39 P 850.

A warrant for payment out of a particular city fund, apparently valid on its face, was protected by former section 94-2001, and alteration thereof was forgery despite the fact that the warrant may have been unlawfully issued because in excess of the debt limitations for the city. *State v. Brett*, 16 M 360, 40 P 873.

Where an instrument appeared on its face to be the obligation of a bank, it was not necessary to allege or prove by extrinsic evidence that such a bank existed in order to convict for forgery of an endorsement in violation of former section 94-2001. *State v. Patch*, 21 M 534, 55 P 108.



Juror's fee certificate which did not bear the district court seal required by statute was void on its face and counterfeiting thereof was not forgery. In re Farrell, 36 M 254, 92 P 785.

It is not necessary that the instrument be negotiable for its false making or endorsement to constitute forgery. Ex parte Solway, 82 M 89, 265 P 21; State v. Phillips, 127 M 381, 264 P 2d 1009.

Checks on the account of an estate were apparently valid when signed by one of the executors and unauthorized completion of the checks constituted forgery despite the fact that they were not signed by the other executor as required by law. State v. Daems, 97 M 486, 37 P 2d 322.

Under former section 94-2001, it was not necessary that the forged instrument create civil liability before it could be held to be forgery. State v. Phillips, 127 M 381, 264 P 2d 1009.

State auditor's warrant was an order within the meaning of former section 94-2001, and the affixing of a false endorsement thereto was forgery under the section. State v. Phillips, 127 M 381, 264 P 2d 1009.

#### Endorsement of Instrument

The offense of forgery was complete when defendant, with intent to defraud, wrote a check to himself and forged the name of another as maker, and it was immaterial that the check was later passed without being endorsed. Ex parte Solway, 82 M 89, 265 P 21.

#### Indians

State court had no jurisdiction of prosecution of an enrolled and allotted Indian for forgery and attempted passing of a check within the exterior boundaries of an Indian reservation, even on patented land. State ex rel. Bokas v. District Court, 128 M 37, 270 P 2d 396.

State court had jurisdiction of prosecution of Indian for passing a forged check outside the reservation even though the check originated within the reservation and belonged to another Indian. Petition of Fox, 141 M 189, 376 P 2d 726.

#### Intent

In prosecution for knowingly passing altered instrument, evidence of other similar acts by defendant about the same time was admissible as bearing on intent. State

v. Mitton, 37 M 366, 96 P 926; State v. Daems, 97 M 486, 37 P 2d 322; State v. Phillips, 127 M 381, 264 P 2d 1009.

Where defendant cashed a check found in his pocket without any recollection of having seen the purported maker and the check was apparently made to him as payee under a different name than that previously used for him by the same purported maker, he had the requisite criminal intent despite intoxication and, the maker's signature having been forged, he was guilty of forgery under former section 94-2001. State v. Cooper, 146 M 336, 406 P 2d 691.

In the absence of evidence that he knew the checks were forged or that the person giving him the checks was a convicted forger, defendant who passed forged checks should have been acquitted. State v. Phillips, 147 M 334, 412 P 2d 205.

#### Person Defrauded

Forgery of a payee's signature and delivery to the obligor showed intent to defraud the payee as well as the obligor. State v. Patch, 21 M 534, 55 P 108.

Information failing to name the person it was intended to defraud would be held bad on demurrer, but the omission was not subject to attack in collateral proceedings on habeas corpus where there was an allegation of general intent to defraud. Ex parte Solway, 82 M 89, 265 P 21.

Allegation of intent to defraud either the bank or the purported maker would have supported conviction of forgery by the false signing of another's name as maker of a check. Ex parte Solway, 82 M 89, 265 P 21.

Where information charging forgery of checks on the account of an estate alleged intent to defraud the executors, the bank and the payee, proof that the executors were defrauded was sufficient and the naming of the other two could be regarded as surplusage. State v. Daems, 97 M 486, 37 P 2d 322.

#### Pleadings

It was proper for an information to contain two counts relating to the same instrument, one alleging that defendant made the forgery and the other that defendant passed the instrument knowing it to have been forged. State v. Mitton, 37 M 366, 96 P 926.

**94-6-311. Obscuring the identity of a machine.** (1) A person commits the offense of obscuring the identity of a machine if he:

(a) removes, defaces, covers, alters, destroys or otherwise obscures the manufacturer's serial number or any other distinguishing identification



number or mark upon any machine, vehicle, electrical device, or firearm, with the purpose to conceal, misrepresent or transfer any such machine, vehicle, electrical device, or firearm; or

(b) possesses with the purpose to conceal, misrepresent or transfer any machine, vehicle, device, or firearm knowing that the serial number or other identification number or mark has been removed or otherwise obscured. The fact of possession or transfer of any such machine, vehicle, electrical device, or firearm creates a presumption that the person knew the serial number or other identification number or mark had been removed or otherwise obscured.

(2) A person convicted of obscuring the identity of a machine shall be fined not to exceed \$500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

**History:** En. 94-6-311 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 1, Ch. 167, L. 1977.

**Source:** Substantially the same as proposed New York Criminal Code, section 170-65.

#### Commission Comment

This section is directed at a specialized class of criminals who deal in machinery and motor vehicles. The citizen is given the opportunity to avoid criminal liability by reporting the fact of the obscured identity to the proper agency.

Vehicles and certain kinds of machinery are particularly vulnerable to organized rings who steal, attempt to render unidentifiable and resell them. Under the old law

only farm machinery was protected from such alteration. (See R. C. M. 1947, section 94-35-262.)

Possession of a vehicle or machine with obscured identity is also a violation, but there must be a purpose to misrepresent and knowledge that the identification number or mark has been obscured or altered. The burden of proving purpose and knowledge rests with the state.

#### Amendments

The 1977 amendment inserted "firearm" throughout the section; added the last sentence of subsection (1)(b); and made minor changes in style.

**94-6-312. Illegal branding or altering or obscuring a brand.** (1) A person commits the offense of illegal branding or altering or obscuring a brand if he marks or brands any commonly domesticated hoofed animal or removes, covers, alters or defaces any existing mark or brand on any commonly domesticated hoofed animal with the purpose to obtain or exert unauthorized control over said animal or with the purpose to conceal, misrepresent, transfer or prevent identification of said animal.

(2) A person convicted of the offense of illegal branding or altering or obscuring a brand shall be imprisoned in the state prison for any term not to exceed ten (10) years.

**History:** En. 94-6-312 by Sec. 1, Ch. 513, L. 1973.

**Source:** Derived from Revised Codes of Montana 1947, sections 94-3504, 94-3514.

#### Commission Comment

This section is merely a recodification

of old Montana law. Although the offense of forgery would seem to make the same acts punishable, the commission deemed it necessary to have this specific statute included in the code in light of the special problems that Montana law enforcement authorities face in the area of cattle rustling.

### DECISIONS UNDER FORMER LAW

#### Unauthorized Brand

An unauthorized brand or mark did not have to touch, alter or deface a former

brand on an animal to be in violation of former section 94-3504. *State v. Johnson*, 155 M 351, 472 P 2d 287.

**94-6-313. Defrauding creditors.** (1) A person commits the offense of defrauding secured creditors if he destroys, conceals, encumbers, transfers, removes from the state, or otherwise deals with property subject to a security interest with the purpose to hinder enforcement of that interest.

(2) "Security interest" means an interest in personal property or fixtures as defined in section 87-1-201 (37) [87A-1-201 (37)] of the Uniform Commercial Code.

(3) A person convicted of the offense of defrauding secured creditors shall be fined not to exceed five hundred dollars (\$500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both.

(4) A person who destroys, conceals, encumbers, transfers, removes from the state, or otherwise deals with property subject to a security interest with the purpose of depriving the owner of the property, or of the proceeds and value therefrom, may be prosecuted under section 94-6-302.

**History:** En. 94-6-313 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 2, Ch. 367, L. 1975.

**Source:** Substantially the same as Model Penal Code, section 224.10.

#### Commission Comment

The states commonly provide criminal penalties for debtors or conditional vendees who dispose of property subject to a security interest to the prejudice of the secured creditor. This is necessary because laws dealing with theft are framed in terms of larceny or embezzlement of goods "of another." Although there is a need for penal legislation in this area, it is possible to go too far in providing penalties for acts such as removing encumbered property from the county or selling the property without the consent of the secured creditor. Such behavior may be evidence of fraud, but it is also quite consistent with innocence, as where the owner-debtor drives his mortgaged car to an out-of-state resort for a weekend without notifying the finance company, or where he

trades the car in on a new car without finance company consent, but makes adequate arrangements to discharge the old debt.

The offense is classified as a misdemeanor regardless of the amount involved. This differs from the section on theft, section 94-6-302 under which stealing amounts over one hundred fifty dollars (\$150) is felonious. The difference seems justified because offenders against this section are less obviously dangerous than outright thieves who take property to which they have no claim. Moreover, sellers can better guard against this kind of criminal behavior in extending credit.

It is no longer a criminal offense to remove mortgaged property from the county as under former Montana law but the section retains the prohibition against removing secured property from the state.

#### Amendments

The 1975 amendment added subsection (4).

### DECISIONS UNDER FORMER LAW

#### Intent

To constitute the crime of removing mortgaged chattels from the county under former section 94-1811, it was necessary that the removal be made with the

intent of depriving the mortgagee of his claim thereto or interest therein. *Averill Machinery Co. v. Taylor*, 70 M 70, 223 P 918.

**94-6-314. Effect of criminal possession of stolen property.** Possession of stolen property shall not constitute proof of the commission of the offense of theft; such fact shall place a burden on the possessor to remove the effect of such fact as a circumstance to be considered with all other evidence pointing to his guilt.

**History:** En. 94-6-314 by Sec. 1, Ch. 513, L. 1973.

**Source:** New.

#### Commission Comment

This section represents a substantial change in the prevailing theory concerning possession of stolen property.

Possession of stolen property is not per se a punishable offense. Possession of stolen property is one of the circumstances which may be considered in establishing that the defendant is guilty of theft.

The provision that the possessor of the stolen property has the burden of removing the evidentiary effect of the pos-

session of the stolen goods may deprive the defendant of the presumption of innocence as well as his right to remain silent. However, in *State v. Gray*, 152 M 145, 447 P 2d 475, 478 (1968), the court held that these fundamental constitutional rights were not violated by such a provision.

## DECISIONS UNDER FORMER LAW

### Explanation of Possession

It was proper to instruct jury that one found in possession of stolen property must explain such possession in order to remove the effect of that fact as a circumstance, to be considered with other evidence, pointing to his guilt. *State v. Gray*, 152 M 145, 447 P 2d 475, explaining *State v. Greeno*, 135 M 580, 342 P 2d 1052.

### Livestock

Instruction in language of former sec-

tion 94-2704.1 that possession of recently stolen livestock is prima facie evidence of guilt of larceny was proper. *State v. Gloyne*, 156 M 94, 476 P 2d 511.

State did not have to overcome presumption of larceny contained in former section 94-2704.1 to convict one in possession of stolen livestock of being a receiver of stolen property under former section 94-2721. *State v. Watkins*, 156 M 456, 481 P 2d 689.

## CHAPTER 7

### OFFENSES AGAINST PUBLIC ADMINISTRATION

#### Part 1—Bribery and Corrupt Influence

- Section 94-7-102. Bribery in official and political matters.  
 94-7-103. Threats and other improper influence in official and political matters.  
 94-7-104. Compensation for past official behavior.  
 94-7-105. Gifts to public servants by persons subject to their jurisdiction.

#### Part 2—Perjury and Other Falsification in Official Matters

- 94-7-202. Perjury.  
 94-7-203. False swearing.  
 94-7-204. Unsworn falsification to authorities.  
 94-7-205. False alarms to agencies of public safety.  
 94-7-206. False reports to law enforcement authorities.  
 94-7-207. Tampering with witnesses and informants.  
 94-7-208. Tampering with or fabricating physical evidence.  
 94-7-209. Tampering with public records or information.  
 94-7-210. Impersonating a public servant.

#### Part 3—Obstructing Governmental Operations

- 94-7-301. Resisting arrest.  
 94-7-302. Obstructing a peace officer or other public servant.  
 94-7-303. Obstructing justice.  
 94-7-304. Failure to aid a peace officer.  
 94-7-305. Compounding a felony.  
 94-7-306. Escape.  
 94-7-307. Transferring illegal articles or unauthorized communication.  
 94-7-308. Bail-jumping.  
 94-7-309. Criminal contempt.

#### Part 4—Official Misconduct

- 94-7-401. Official misconduct.

#### Part 5—Treason, Flags and Related Offenses

- 94-7-502. Desecration of flags.  
 94-7-503. Criminal syndicalism.  
 94-7-504. Bringing armed men into the state.



## Part 1

## Bribery and Corrupt Influence

## 94-7-101. Repealed.

## Repeal

Section 94-7-101 (Sec. 1, Ch. 513, L. 1973), relating to definitions, was repealed by Sec. 77, Ch. 359, Laws 1977.

**94-7-102. Bribery in official and political matters.** (1) A person commits the offense of bribery if he purposely or knowingly offers, confers, or agrees to confer upon another, or solicits, accepts or agrees to accept from another:

(a) any pecuniary benefit as a consideration for the recipient's decision, opinion, recommendation, vote or other exercise of discretion as a public servant, party official or voter; or

(b) any benefit as consideration for the recipient's decision, vote, recommendation or other exercise of official discretion in a judicial or administrative proceeding; or

(c) any benefit as consideration for a violation of a known duty as a public servant or party official.

It is no defense to prosecution under this section that a person whom the offender sought to influence was not qualified to act in the desired way whether because he had not yet assumed office, or lacked jurisdiction, or for any other reason.

(2) A person convicted of the offense of bribery shall be imprisoned in the state prison for any term not to exceed ten (10) years, and shall forever be disqualified from holding any public office in this state.

**History:** En. 94-7-102 by Sec. 1, Ch. 513, L. 1973.

**Source:** Identical to Model Penal Code, section 240.1.

## Commission Comment

Subsection (a) prohibits the giving or receiving of any pecuniary benefit to influence official or political discretion. Offers of nonpecuniary gain, e.g., political support, honorific appointments, are pen-

alized under subsection (b) but limited to judicial and administrative proceedings. "Administrative proceedings" is defined in section 94-2-101(3) and includes some actions that might be called "executive" or "administrative," where the official action applies a general rule to an individual, e.g., in granting or revoking a license, awarding veteran's disability compensation or social security payments. Gifts to officials are covered by section 94-7-105.

## DECISIONS UNDER FORMER LAW

## Disbarment

Bribery of members of the legislature was a felony under former section 94-2905 and would furnish ample ground for disbarment even though the acts were not in the attorney's official capacity, but the supreme court would not, as a matter of policy, act on disbarment until after criminal prosecution. In re Wellcome, 23 M 140, 58 P 45.

## Intent

Allegation that sheriff received a bribe did not charge a violation of former section 94-3904 without an allegation of agreement that his official action would be influenced; sheriff may have intended

entrapment or some other lawful purpose. State ex rel. Beazley v. District Court, 75 M 116, 241 P 1075.

## "Judicial Officer"

Defendant, who offered a bribe to a deputy county attorney, was properly convicted under former section making it an offense to offer bribes to a "judicial officer." State v. Hensley, — M —, 554 P 2d 745.

## Jurors

Former section 94-801, covering bribery of judicial officials, applied to members of the jury panel who might be selected to try a case, not just to those who had

been selected and sworn. State ex rel. Webb v. District Court, 37 M 191, 95 P 593.

On prosecution for attempt to influence grand juror, evidence of transactions after

juror had been discharged by operation of law was inadmissible even though defendant did not know that juror had been discharged. State v. Porter, 125 M 503, 242 P 2d 984.

**94-7-103. Threats and other improper influence in official and political matters.** (1) A person commits an offense under this section if he purposely or knowingly:

(a) threatens unlawful harm to any person with the purpose to influence his decision, opinion, recommendation, vote, or other exercise of discretion as a public servant, party official, or voter;

(b) threatens harm to any public servant with the purpose to influence his decision, opinion, recommendation, vote, or other exercise of discretion in a judicial or administrative proceeding;

(c) threatens harm to any public servant or party official with the purpose to influence him to violate his duty;

(d) privately addresses to any public servant who has or will have official discretion in a judicial or administrative proceeding any representation, entreaty, argument, or other communication designed to influence the outcome on the basis of considerations other than those authorized by law; or

(e) as a juror or officer in charge of a jury receives or permits to be received any communication relating to any matter pending before such jury, except according to the regular course of proceedings.

(2) It is no defense to prosecution under subsections (1)(a) through (1)(d) that a person whom the offender sought to influence was not qualified to act in the desired way, whether because he had not yet assumed office or lacked jurisdiction or for any other reason.

(3) A person convicted under this section shall be fined not to exceed \$500 or imprisoned in the county jail for any term not to exceed 6 months, or both, unless the offender threatened to commit an offense or made a threat with the purpose to influence a judicial or administrative proceeding, in which case the offender shall be imprisoned in the state prison for any term not to exceed 10 years.

**History:** En. 94-7-103 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 25, Ch. 359, L. 1977.

**Source:** Substantially the same as Model Penal Code, section 240.2.

#### Commission Comment

Penal legislation against the use of intimidation to influence the behavior of public officials is much rarer than legislation against bribery, although there

are many statutes relating to jurors, legislators, and law enforcement officers.

#### Amendments

The 1977 amendment made the former second sentence of subsection (1)(d) present subsection (2); redesignated former subsection (2) as subsection (3); and made minor changes in phraseology, punctuation and style.

### DECISIONS UNDER FORMER LAW

#### Jurors

On prosecution for attempt to influence grand juror, evidence of transactions after juror had been discharged by operation of law was inadmissible even though defendant did not know that juror had been discharged. State v. Porter, 125 M 503, 242 P 2d 984.

#### Regular Course of Proceedings

Conversations with a grand juror at his home were clearly outside the regular course of proceedings of the grand jury so were not within the communications permitted by the exception to former section 94-804. State v. Porter, 125 M 503, 242 P 2d 984.

**94-7-104. Compensation for past official behavior.** (1) A person commits an offense under this section if he knowingly solicits, accepts, or agrees to accept any pecuniary benefit as compensation for having as a public servant given a decision, opinion, recommendation, or vote favorable to another, for having otherwise exercised a discretion in another's favor, or for having violated his duty. A person commits an offense under this section if he knowingly offers, confers, or agrees to confer compensation which is prohibited by this section.

(2) A person convicted under this section shall be fined not to exceed \$500 or imprisoned in the county jail for any term not to exceed 6 months, or both.

**History:** En. 94-7-104 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 26, Ch. 359, L. 1977.

**Source:** Identical to Model Penal Code, section 240.3.

#### **Commission Comment**

There is little legislative precedent for this section, but it obviates the difficulty occasionally encountered in a bribery prosecution when the defendant contends that he did not solicit or receive anything until after the official transaction had been

completed. This behavior should be discouraged because it undermines the integrity of government. Compensation for past action implies a promise of similar compensation for future favor.

#### **Amendments**

The 1977 amendment deleted "acceptance of" before "which is prohibited" in the last sentence of subsection (1); and made minor changes in phraseology, punctuation and style.

**94-7-105. Gifts to public servants by persons subject to their jurisdiction.** (1) No public servant in any department or agency exercising regulatory function, or conducting inspections or investigations, or carrying on a civil or criminal litigation on behalf of the government, or having custody of prisoners, shall solicit, accept or agree to accept any pecuniary benefit from a person known to be subject to such regulation, inspection, investigation or custody, or against whom such litigation is known to be pending or contemplated.

(2) No public servant having any discretionary function to perform in connection with contracts, purchases, payments, claims or other pecuniary transactions of the government shall solicit, accept or agree to accept any pecuniary benefit from any person known to be interested in or likely to become interested in any such contract, purchase, payment, claim or transaction.

(3) No public servant having judicial or administrative authority and no public servant employed by or in a court or other tribunal having such authority or participating in the enforcement of its decision, shall solicit, accept, or agree to accept any pecuniary benefit from a person known to be interested in or likely to become interested in any matter before such public servant or tribunal with which he is associated.

(4) No legislator or public servant employed by the legislature or by any committee or agency thereof shall solicit, accept or agree to accept any pecuniary benefit from a person known to be interested in or likely to become interested in any matter before the legislature or any committee or agency thereof.

(5) **Exceptions.** This section shall not apply to:

(a) fees prescribed by law to be received by a public servant, or any



other benefit for which the recipient gives legitimate consideration or to which he is otherwise entitled; or

(b) trivial benefits incidental to personal, professional or business contacts and involving no substantial risk of undermining official impartiality.

(6) No person shall knowingly confer, or offer, or agree to confer, any benefit prohibited by the foregoing subsections.

(7) A person convicted of an offense under this section shall be fined not to exceed five hundred dollars (\$500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both.

**History:** En. 94-7-105 by Sec. 1, Ch. 513, L. 1973.

**Source:** Substantially the same as Model Penal Code, section 240.5.

**Commission Comment**

This section covers gifts by businessmen to government inspectors or by car-

riers and utilities to regulatory authorities. In some cases a noncriminal sanction against a public servant would be preferred, but there is difficulty in arriving at satisfactory generalizations for all classes of persons and conduct covered by this section. This section is broader than the old law.

## Part 2

### Perjury and Other Falsification in Official Matters

#### 94-7-201. Repealed.

**Repeal**

Section 94-7-201 (Sec. 1, Ch. 513, L.

1973), relating to definitions, was repealed by Sec. 77, Ch. 359, Laws 1977.

**94-7-202. Perjury.** (1) A person commits the offense of perjury if in any official proceeding he knowingly makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material.

(2) A person convicted of perjury shall be punished by imprisonment in the state prison for any term not to exceed ten (10) years.

(3) Falsification is material, regardless of the admissibility of the statement under rules of evidence, if it could have affected the course or outcome of the proceeding. It is no defense that the declarant mistakenly believed the falsification to be immaterial. Whether a falsification is material in a given factual situation is a question of law.

(4) It is not a defense to prosecution under this section that the oath or affirmation was administered or taken in an irregular manner or that the declarant was not competent to make the statement. A document purporting to be made upon oath or affirmation at any time when the offender presents it as being so verified shall be deemed to have been duly sworn or affirmed.

(5) No person shall be guilty of an offense under this section if he retracted the falsification in the course of the proceeding in which it was made before it became manifest that the falsification was or would be exposed and before the falsification substantially affected the proceeding.

(6) Where the defendant made inconsistent statements under oath or equivalent affirmation, both having been made within the period of the

statute of limitations, the prosecution may proceed by setting forth the inconsistent statements in a single count alleging in the alternative that one or the other was false and not believed by the defendant. In such case it shall not be necessary for the prosecution to prove which statement was false but only that one or the other was false and not believed by the defendant to be true.

(7) No person shall be convicted of an offense under this section where proof of falsity rests solely upon the testimony of a single person other than the defendant.

**History:** En. 94-7-202 by Sec. 1, Ch. 513, L. 1973.

**Source:** Substantially the same as Model Penal Code, section 241.1.

#### Commission Comment

The proposed definition of "materiality" in subsection (3) does not differ substantially from that given by prior law. The question of materiality in a perjury trial is not governed by the rules of evidence applicable in the proceeding. It would be against public policy to immunize false swearing merely because the testimony might have been excluded on objection which was not made. The result would be that an unqualified expert witness could not be punished for consciously falsifying an opinion which he did in fact give to the jury. It should be noted that this section applies to grand jury proceedings, legislative investigations, and administrative hearings, as well as to court trials, each with its own peculiar rules of evidence. Technical irregularities in the administration of the oath are of no concern to the defendant as provided in subsection (4). This is not a change from prior law. Subsection (5) making a re-

traction a defense is new. It is included in many state code revisions since it attempts to preserve incentive to correct falsehoods, without impairing the compulsion to tell the truth in the first place. The danger that witnesses might be encouraged to take a chance on perjury is limited by the requirement that recantation must take place before the falsity becomes manifest. The distinctive feature of subsection (6) is that accusation and proof in the alternative is authorized, without relieving the prosecution of the burden of proving *mens rea*. The defendant would not be able to escape conviction because the state cannot prove which of the contradictory statements was false and known to be so. The rule that proof of falsity be by at least two witnesses with corroborating circumstances was adopted at common law because of the problem created by an oath against an oath. The policy question to be decided is whether the protection of witnesses counter-balances the occasional inability to convict an apparent perjurer. The majority of jurisdictions still require at least one witness and corroborating circumstances.

### DECISIONS UNDER FORMER LAW

#### Knowledge of Falsity

Attorney's statement that a note had been delivered to a corporation was not perjury justifying disbarment where the evidence showed that the attorney had endorsed the note and given it to his partner, who was an agent for the corporation, with instructions to deliver it to the corporation, so that the attorney had reason to believe his statement true. *In re McCue*, 80 M 537, 261 P 341.

Even though one can be guilty of perjury in making an unqualified statement when he does not have knowledge as to its truth, yet it is not perjury to make a statement in good faith and in the belief of its truth even though the statement later proves false. *State v. Jackson*, 88 M 420, 293 P 309.

#### Material Statement

Statement by witness at murder trial

that he arrived at a certain town at a certain time the day after the homicide, which statement related indirectly to a trip during which the homicide weapon was allegedly disposed of, was not a material statement, so was not perjury, even though it contradicted the testimony and might have reflected on the credibility of another witness. *State v. Hall*, 88 M 297, 292 P 734.

#### Pleadings

An information charging perjury in swearing that a certain event happened at 11 o'clock, without stating whether it was in the morning or at night, was sufficient, where no person of ordinary intelligence could, from a reading of other portions of the pleading, have arrived at any other conclusion than that it meant 11 o'clock in the forenoon. *State v. Jackson*, 88 M 420, 293 P 309.



**94-7-203. False swearing.** (1) A person commits the offense of false swearing if he knowingly makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of such a statement previously made when he does not believe the statement to be true, and:

(a) the falsification occurs in an official proceeding; or

(b) the falsification is purposely made to mislead a public servant in performing his official function; or

(c) the statement is one which is required by law to be sworn or affirmed before a notary or other person authorized to administer oaths.

(2) Subsections (4) to (7) of section 94-7-202 apply to this section.

(3) A person convicted of false swearing shall be fined not to exceed five hundred dollars (\$500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both.

**History:** En. 94-7-203 by Sec. 1, Ch. 513, L. 1973.

**Source:** Substantially the same as Model Penal Code, section 241.2.

#### Commission Comment

This section makes it a misdemeanor to swear falsely in cases not amounting to perjury under section 94-7-202. Thus, if the false statement is made in an official proceeding, but is not material, it falls within subdivision (a) of subsection (1). If it is material, but is not

made in an official proceeding involving a hearing, subdivision (b) applies. Subdivision (c) applies where an affidavit is sworn to before a notary public, but is restricted to affidavits required by law. The possibility of abuse where there is criminal liability for falsification in private affidavits has occurred where such law exists. For example, small loan companies have been known to obtain oaths from debtors and threaten criminal charges to collect on their loans.

#### DECISIONS UNDER FORMER LAW

##### Venue of Prosecution

Where defendant swore to a false statement before a notary public in Lake County in a document to be filed with the state board of equalization in Lewis and Clark County, the offense was complete when the document was placed in the mails addressed to the board or was handed to some other person with in-

structions to deliver it to the board, and the district court of Lewis and Clark County did not have jurisdiction in the absence of evidence that defendant personally delivered the document to the board's office. *State v. Rother*, 130 M 357, 303 P 2d 393, distinguished in — M —, 548 P 2d 949.

**94-7-204. Unsworn falsification to authorities.** (1) A person commits an offense under this section if, with purpose to mislead a public servant in performing his official function, he

(a) makes any written false statement which he does not believe to be true; or

(b) purposely creates a false impression in a written application for any pecuniary or other benefit by omitting information necessary to prevent statements therein from being misleading; or

(c) submits or invites reliance on any writing which he knows to be forged, altered or otherwise lacking in authenticity; or

(d) submits or invites reliance on any sample, specimen, map, boundary mark or other object which he knows to be false.

(2) A person convicted of an offense under this section shall be fined not to exceed five hundred dollars (\$500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both.



**History:** En. 94-7-204 by Sec. 1, Ch. 513, L. 1973.

**Source:** Substantially the same as Model Penal Code, section 241.3.

**Commission Comment**

This section was suggested by 18 U. S.C. Sec. 1001, which authorizes imprisonment up to five (5) years for knowing mis-statement of material fact in "any matter within the jurisdiction of any de-

partment or agency of the United States." There is no parallel in the Montana law. There is a requirement of writing and purpose to mislead in this section, as well as the extension of liability to misleading omissions, in subdivision (1)(b), and to things other than writings, e.g., false samples, etc., in subdivision (1)(d). If there is a pecuniary benefit from misleading omissions, the code provisions on theft by deception would apply.

**94-7-205. False alarms to agencies of public safety.** (1) A person commits an offense under this section if he knowingly causes a false alarm of fire or other emergency to be transmitted to or within any organization, official or volunteer, which deals with emergencies involving danger to life or property.

(2) A person convicted of an offense under this section shall be fined not to exceed five hundred dollars (\$500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both.

**History:** En. 94-7-205 by Sec. 1, Ch. 513, L. 1973.

**Source:** Identical to Model Penal Code, section 241.4.

**Commission Comment**

This section covers all dangerous emergency alarms, e.g., floods, hurricanes,

landslides, civil defense. The police force would qualify as an emergency organization. The provision is justifiable on the ground of waste of government resources and the likelihood that the actor will cause personnel or equipment to be unavailable to deal with real emergencies.

**94-7-206. False reports to law enforcement authorities.** (1) A person commits an offense under this section if he knowingly:

(a) gives false information to any law enforcement officer with the purpose to implicate another; or

(b) reports to law enforcement authorities an offense or other incident within their concern knowing that it did not occur; or

(c) pretends to furnish such authorities with information relating to an offense or incident when he knows he has no information relating to such offense or incident.

(2) A person convicted under this section shall be fined not to exceed five hundred dollars (\$500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both.

**History:** En. 94-7-206 by Sec. 1, Ch. 513, L. 1973.

**Source:** Substantially the same as Model Penal Code, section 241.5.

**Commission Comment**

Few state statutes now deal with this of-

fense. The recent Wisconsin Code, section 346.30(a) requires that the officer act in reliance upon such false information, but such behavior is likely to have antisocial consequences regardless of any action in reliance.

**94-7-207. Tampering with witnesses and informants.** (1) A person commits the offense of tampering with witnesses and informants if, believing that an official proceeding or investigation is pending or about to be instituted, he purposely or knowing attempts to induce or otherwise cause a witness or informant to:

(a) testify or inform falsely;  
 (b) withhold any testimony, information, document, or thing;  
 (c) elude legal process summoning him to testify or supply evidence; or  
 (d) absent himself from any proceeding or investigation to which he has been summoned.

(2) A person convicted of tampering with witnesses or informants shall be imprisoned in the state prison for any term not to exceed 10 years.

**History:** En. 94-7-207 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 27, Ch. 359, L. 1977.

**Source:** Substantially the same as Model Penal Code, section 241.6.

gives the judge discretion to impose a sentence of up to ten (10) years if the circumstances justify it.

#### **Amendments**

The 1977 amendment made minor changes in phraseology, punctuation and style.

#### **Commission Comment**

This section covers "informants" and "witnesses." Under prior law most such offenses were misdemeanors. This section

### **DECISIONS UNDER FORMER LAW**

#### **Secreting Witness**

The action of a party to a civil action in secreted and forcibly keeping in hiding a material witness of his adversary until the trial was concluded, and thus suppressing material testimony, constituted a misdemeanor under former section 94-1705 and was an offense so odious and so utterly at war with every intelligent notion of the due administration of justice

as to require a new trial after a verdict for the party who tampered. *Buntin v. Chicago, M. & St. P. Ry. Co.*, 54 M 495, 172 P 330.

Accused's attempt to hide state's witness against him in a criminal prosecution and to intimidate her could have been grounds for prosecution under former section 94-1705. *State v. Crockett*, 148 M 402, 421 P 2d 722.

**94-7-208. Tampering with or fabricating physical evidence.** (1) A person commits the offense of tampering with or fabricating physical evidence if, believing that an official proceeding or investigation is pending or about to be instituted, he

(a) alters, destroys, conceals or removes any record, document or thing with purpose to impair its verity or availability in such proceeding or investigation; or

(b) makes, presents or uses any record, document or thing knowing it to be false and with purpose to mislead any person who is or may be engaged in such proceeding or investigation.

(2) A person convicted of tampering with or fabricating physical evidence shall be imprisoned in the state prison for a term not to exceed ten (10) years.

**History:** En. 94-7-208 by Sec. 1, Ch. 513, L. 1973.

**Source:** Identical to Model Penal Code, section 241.7.

#### **Commission Comment**

This section is broader than prior law since it covers investigations as well as trials and other formal proceedings.

**94-7-209. Tampering with public records or information.** (1) A person commits the offense of tampering with public records or information if he:

(a) knowingly makes a false entry in, or false alteration of, any record, document, legislative bill or enactment, or thing belonging to, or received or issued, or kept by the government for information or record, or required by law to be kept by others for information of the government; or

(b) makes, presents or uses any record, document or thing knowing it to be false, and with purpose that it be taken as a genuine part of information or records referred to in paragraph (a) ; or

(c) purposely destroys, conceals, removes or otherwise impairs the verity or availability of any such record, document or thing.

(2) A person convicted of the offense of tampering with public records or information shall be imprisoned in the state prison for any term not to exceed ten (10) years.

**History:** En. 94-7-209 by Sec. 1, Ch. 513, L. 1973.

**Source:** Substantially the same as Model Penal Code, section 241.8.

**Commission Comment**

It is common to penalize falsification, destruction or concealment of public rec-

ords. The only innovation in this section is the explicit provision of subdivision (1) (b) as to fabrication of false records. This section would not cover records of private persons; however, records maintained at the behest of government, such as legislative bills or enactments would fall within this section.

DECISIONS UNDER FORMER LAW

**Concealment**

The willful act of an officer of the senate in failing to send a legislative bill to the clerk to receive it next in the normal course of procedure constituted "secreting" within the meaning of former section 94-2722. State v. Bloor, 20 M 574, 52 P 611.

**Indexing**

Former section 94-2722 had no refer-

ence to and did not prevent indexing of public records. State ex rel. Coad v. District Court, 23 M 171, 57 P 1095.

**Intent**

"Willfully" as used in former section 94-2722 required only that an act be done by design or set purpose, not that it be with intent to injure or defraud any particular person. State v. Bloor, 20 M 574, 52 P 611.

**94-7-210. Impersonating a public servant.** (1) A person commits the offense of impersonating a public servant if he falsely pretends to hold a position in the public service with purpose to induce another to submit to such pretended official authority or otherwise to act in reliance upon that pretense to his prejudice.

(2) A person convicted of impersonating a public servant shall be fined not to exceed five hundred dollars (\$500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both.

**History:** En. 94-7-210 by Sec. 1, Ch. 513, L. 1973.

**Source:** Substantially the same as Model Penal Code, section 241.9.

**Commission Comment**

Legislation prohibiting impersonation of some or all public officials is found in

most penal codes. The object is to prevent imposition on people by the pretense of authority, and partly to ensure proper respect for genuine authority by suppressing discreditable imitations. These objectives are regarded as especially important in relation to law enforcement officers.

**Part 3**

**Obstructing Governmental Operations**

**94-7-301. Resisting arrest.** (1) A person commits the offense of resisting arrest if he knowingly prevents or attempts to prevent a peace officer from effecting an arrest by:



(a) using or threatening to use physical force or violence against the peace officer or another; or

(b) using any other means which creates a risk of causing physical injury to the peace officer or another.

(2) It is no defense to a prosecution under this section that the arrest was unlawful, provided the peace officer was acting under color of his official authority.

(3) A person convicted of the offense of resisting arrest shall be fined not to exceed five hundred dollars (\$500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both.

**History:** En. 94-7-301 by Sec. 1, Ch. 513, L. 1973.

**Source:** Substantially the same as the proposed Michigan Code, section 4625.

**94-7-302. Obstructing a peace officer or other public servant.** (1) A person commits the offense of obstructing a peace officer or public servant if he knowingly obstructs, impairs or hinders the enforcement of the criminal law, the preservation of the peace, or the performance of a governmental function.

(2) It is no defense to a prosecution under this section that the peace officer was acting in an illegal manner, provided he was acting under color of his official authority.

(3) A person convicted of the offense of obstructing a peace officer or other public servant shall be fined not to exceed five hundred dollars (\$500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both.

**History:** En. 94-7-302 by Sec. 1, Ch. 513, L. 1973.

**Source:** New.

#### **Commission Comment**

This section is designed to deal generally with the knowing obstruction of governmental activities. It protects both peace officers and public servants in the administration of their respective duties. Generally, the section seeks to retain the coverage of the old law to encompass protection of all governmental functions. It

imposes a uniform mens rea requirement for all illegal obstruction, i.e., knowingly.

The section requires a person to "knowingly" obstruct, impair or hinder government administration. The old law required a "willful" obstruction. Subsection (2) of this section makes a distinction between the obstruction of illegal activity by a peace officer and a public servant. The commission has followed the basic premise that a person should not take the law into his own hands when faced with illegal police activity.

#### **DECISIONS UNDER FORMER LAW**

##### **Investigation by Peace Officer**

Where store delayed approval of check tendered by plaintiff for merchandise while police were called for investigation of suspected forgery, but plaintiff meanwhile demanded return of the check, it was his property and he had a right to

possession of it, and his subsequent detention after attempting to snatch the check from the hand of a police officer gave rise to a cause of action against the store. *Harrer v. Montgomery Ward & Co.*, 124 M 295, 221 P 2d 428.

**94-7-303. Obstructing justice.** (1) For the purpose of this section "an offender" means a person who has been or is liable to be arrested, charged, convicted or punished for a public offense.

(2) A person commits the offense of obstructing justice if, knowing a person is an offender, he purposely:

- (a) harbors or conceals an offender; or
- (b) warns an offender of impending discovery or apprehension, except this does not apply to a warning given in connection with an effort to bring an offender into compliance with the law; or
- (c) provides an offender with money, transportation, weapon, disguise or other means of avoiding discovery or apprehension; or
- (d) prevents or obstructs, by means of force, deception or intimidation anyone from performing an act that might aid in the discovery or apprehension of an offender; or
- (e) suppresses by act of concealment, alteration or destruction any physical evidence that might aid in the discovery or apprehension of an offender; or
- (f) aids an offender who is subject to official detention to escape from such official detention.

(3) A person convicted of obstructing justice shall be:

- (a) imprisoned in the state prison for a term not to exceed ten (10) years if the offender has been or is liable to be charged with a felony; or
- (b) fined not to exceed five hundred dollars (\$500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both, if the offender has been or is liable to be charged with a misdemeanor.

**History:** En. 94-7-303 by Sec. 1, Ch. 513, L. 1973.

**Source:** New.

#### **Commission Comment**

The section is based on the theory that a person who aids another to elude apprehension or trial is obstructing justice and interfering with the processes of government. It is his willingness to interfere and the harm threatened by such interference that constitutes the offense rather than any fiction that equates a "harborer" with the murderer or traitor whom he harbors.

This section makes it an offense to aid misdemeanants as well as felons. This result follows from the purpose to deter an obstruction of justice. Also the aider may not know what crime the offender has committed.

Knowledge or reason to believe that the putative offender is guilty of or charged

with a crime is simply evidence of the purpose to aid the putative offender to elude justice. A purpose to aid the offender to avoid arrest is not proved merely by showing that defendant gave succor to one who was in fact a fugitive. When a fugitive seeks help from friends and relatives there may be other motivations in addition to the objective of impeding law enforcement. Such other motivations are not taken into consideration by way of exception of certain classes of near kin, but could possibly be a ground for mitigating sentence after conviction. This section specifies the prohibited forms of aid in addition to the traditional offense of harboring or concealing the fugitive. Subdivision (2)(b) contains an exception to take care of cases like fellow-motorists warning speeder to slow down, or a lawyer advising a client to discontinue illegal activities.

### **DECISIONS UNDER FORMER LAW**

#### **Corroboration of Accessory**

Witness who became an accessory after the fact under former section 94-205 by receiving part of the stolen property and by failure to report the theft did not thereby become an accomplice so as to require corroboration of his testimony. *State v. Slothower*, 56 M 230, 182 P 270.

#### **Harboring Misdemeanant**

Former section 94-205, defining as ac-

cessories after the fact persons harboring criminals, applied only to felonies, and where the charge filed against the principal was only a misdemeanor, defendant who harbored him was properly discharged on demurrer even though under the facts the principal might have been charged with a felony. *State v. Williams*, 106 M 516, 79 P 2d 314.

**94-7-304. Failure to aid a peace officer.** (1) Where it is reasonable for a peace officer to enlist the co-operation of a person in

(a) effectuating or securing an arrest of another (pursuant to R. C. M. 95-609), or

(b) preventing the commission by another of an offense, a peace officer may order such person to co-operate. A person commits the offense of failure to aid a peace officer if he knowingly refuses to obey such an order.

(2) A person convicted of the offense of failure to aid a peace officer shall be fined not to exceed five hundred dollars (\$500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both.

**History:** En. 94-7-304 by Sec. 1, Ch. 513, L. 1973. (see definition of peace officer in R. C. M. 1947, section 95-210). Rather than require every eighteen-year-old male to assist, a more flexible standard of reasonableness is substituted.

**Source:** New.

**Commission Comment**

The section is limited to "peace officer"

**DECISIONS UNDER FORMER LAW**

**Compensation of Posse Comitatus**

Former section 94-35-177, requiring adult males to join a posse comitatus when required by the sheriff, did not require or

authorize the county to reimburse members of the posse for their services or for expenses incurred. *Sears v. Gallatin County*, 20 M 462, 52 P 204.

**94-7-305. Compounding a felony.** (1) A person commits the offense of compounding a felony if he knowingly accepts or agrees to accept any pecuniary benefit in consideration for:

(a) refraining from seeking prosecution of a felony; or

(b) refraining from reporting to law enforcement authorities the commission or suspected commission of any felony or information relating to a felony.

(2) A person convicted of compounding a felony shall be fined not to exceed five hundred dollars (\$500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both.

**History:** En. 94-7-305 by Sec. 1, Ch. 513, L. 1973.

**Source:** New.

**Commission Comment**

The significant difference between this section and prior law is that there is no grading of the offense.

**94-7-306. Escape.** (1) "Official detention" means imprisonment which resulted from a conviction for an offense, confinement for an offense, confinement of a person charged with an offense, detention by a peace officer pursuant to arrest, detention for extradition or deportation, or any lawful detention for the purpose of the protection of the welfare of the person detained or for the protection of society; but "official detention" does not include supervision of probation or parole, constraint incidental to release on bail, or an unlawful arrest unless the person arrested employed physical force, a threat of physical force, or a weapon to escape.

(2) A person subject to official detention commits the offense of escape if he knowingly or purposely removes himself from official detention or fails to return to official detention following temporary leave granted for a specific purpose or limited time.



(3) A person convicted of the offense of escape shall be:

(a) imprisoned in the state prison for a term not to exceed twenty (20) years if he escapes from a state prison, county jail or city jail by the use or threat of force, physical violence, weapon or simulated weapon; or

(b) imprisoned in the state prison for a term not to exceed ten (10) years if he:

(i) escapes from a state prison, county jail or city jail; or

(ii) escapes from another official detention by the use or threat of force, physical violence, weapon or simulated weapon; or

(c) fined not to exceed five hundred dollars (\$500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both if he commits escape under circumstances other than (a) and (b) of this subsection.

**History:** En. 94-7-306 by Sec. 1, Ch. 513, L. 1973.

**Source:** New.

#### **Commission Comment**

The section classifies escapes according to the risk they create. Punishment is more severe for the offense when committed by the use of or threat of force, physical violence, weapon or simulated weapon. The grading of the offense by relying on the prisoner's use of force is actually a return to common law, since early common law clearly distinguished between escapes with and without use of force. The grading scheme implicit in the old code by which punishment is provided in reference to the type of confinement, is not entirely abandoned by section 94-7-

306. For example, use of force in escaping from a noninstitutional detention calls for a lesser punishment than escape from a prison, county or city jail. Further, an escape without use of force from a non-institutional detention as provided in subdivision (3)(c) removes the offense from the felony category altogether.

Another grading method for escapes is based on the seriousness of the crime causing the detention. The section includes the grading indirectly in that the seriousness of the crime causing the detention is indicated by the institution in which the detention is made. For example, persons held in the state prison will usually be felons while those in city or county jails will be misdemeanants.

### **DECISIONS UNDER FORMER LAW**

#### **Consecutive Sentences**

Former section 94-4203, providing that sentence for escape should be consecutive to term for which then in confinement, did not result in automatic discharge of the first sentence when a prisoner was paroled on the escape sentence. *State ex rel. Herman v. Powell*, 139 M 583, 367 P 2d 553; *Petition of Duran*, 152 M 111, 448 P 2d 137.

#### **Conspiracy to Rescue**

In a prosecution for second degree assault on a police officer, evidence of a conspiracy to rescue a prisoner being

taken to jail by the officer was admissible to establish liability of members of the conspiracy not proved to have committed the assault personally. *State v. Dennison*, 94 M 159, 21 P 2d 63.

#### **Lawful Detention**

Neither former section 94-4207, relating to assisting a prisoner to escape, nor former section 94-4208, relating to giving a prisoner anything useful in making an escape, required proof that the imprisonment was lawful. *State v. Zuidema*, 157 M 367, 485 P 2d 952.

### **94-7-307. Transferring illegal articles or unauthorized communication.**

(1) (a) A person commits the offense of transferring illegal articles if he knowingly or purposely transfers any illegal article or thing to a person subject to official detention or is transferred any illegal article or thing by a person subject to official detention.

(b) A person convicted of transferring illegal articles shall be:

(i) imprisoned in the state prison for a term not to exceed 20 years, if he conveys a weapon to a person subject to official detention; or

(ii) fined not to exceed \$100 or imprisoned in the county jail for any term not to exceed 10 days, or both, if he conveys any other illegal article or thing to a person subject to official detention.

(c) Subsection (1)(b)(ii) does not apply unless the offender knew or was given sufficient notice so that he reasonably should have known that the article or thing he conveyed was an illegal article.

(2) (a) A person commits the offense of unauthorized communication if he knowingly or purposely communicates with a person subject to official detention without the consent of the person in charge of such official detention.

(b) A person convicted of the offense of unauthorized communication shall be fined not to exceed \$100 or imprisoned in the county jail for any term not to exceed 10 days, or both.

**History:** En. 94-7-307 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 28, Ch. 359, L. 1977.

**Source:** Derived from Revised Codes of Montana 1947, sections 94-35-241, 94-35-264 and 94-4208.

#### Commission Comment

The section does not require proof of an intent to assist an inmate to escape, but requires only that the actor intended to convey the item involved. It is sufficient that he know the nature of the item as an illegal article, i.e., something that he is prohibited from conveying to the inmate

by statute, regulation or institutional rule. The offense is graded on the basis of the nature of the article or thing introduced, i.e., if the thing be a deadly weapon, the offense is a felony; and the section applies to all official detention rather than just the state prison.

#### Amendments

The 1977 amendment inserted "illegal" before "article or thing" twice in subsection (1)(a); and made minor changes in style, phraseology and punctuation.

### DECISIONS UNDER FORMER LAW

#### Lawful Detention

Former section 94-4208, relating to giving a prisoner anything useful in making

an escape, did not require proof that the imprisonment was lawful. *State v. Zuidema*, 157 M 367, 485 P 2d 952.

**94-7-308. Bail-jumping.** (1) A person commits the offense of bail-jumping if, having been set at liberty by court order, with or without security, upon condition that he will subsequently appear at a specified time and place, he purposely fails without lawful excuse to appear at that time and place.

(2) This section shall not interfere with the exercise by any court of its power to punish for contempt.

(3) This section shall not apply to a person set at liberty by court order upon condition that he will appear in connection with a charge of having committed a misdemeanor, except it shall apply where the judge has released the defendant on his own recognizance.

(4) A person convicted of bail-jumping in connection with a felony shall be imprisoned in the state prison for a term not to exceed ten (10) years. In all other cases he shall be fined not to exceed five hundred dollars (\$500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both.

**History:** En. 94-7-308 by Sec. 1, Ch. 513, L. 1973.

**Source:** New.

#### **Commission Comment**

Statutes designating the offense of "bail-jumping" are of comparatively recent origin. The first such statute was passed in New York in 1928, and it was over a generation later that the federal provision was enacted in 1954. Montana had no statute making it a separate punishable crime for failure to comply within a condition of a bail bond or recognizance, although such a provision had been antici-

pated. In the proposed Montana Code of Criminal Procedure of 1966, under section 95-1106, the following comment can be found: "In addition it is recommended that Montana make it a separate punishable crime not to appear, regardless of the method by which the accused was released. It is believed this will be a greater deterrent than any anticipated financial loss." The section is graded on the basis of the seriousness of the crime charged so bail-jumping in connection with a felony is a potential felony and all other cases of bail-jumping are misdemeanors.

**94-7-309. Criminal contempt.** (1) A person commits the offense of criminal contempt when he knowingly engages in any of the following conduct:

(a) disorderly, contemptuous, or insolent behavior, committed during the sitting of a court, in its immediate view and presence and directly tending to interrupt its proceedings or to impair the respect due to its authority; or

(b) breach of the peace, noise, or other disturbance, directly tending to interrupt a court's proceeding; or

(c) purposely disobeying or refusing any lawful process or other mandate of a court; or

(d) unlawfully refusing to be sworn as a witness in any court proceeding or, after being sworn, refusing to answer any legal and proper interrogatory; or

(e) purposely publishing a false or grossly inaccurate report of a court's proceeding; or

(f) purposely failing to obey any mandate, process or notice relative to juries issued pursuant to Title 93, chapters 12, 13, 14, 15, 16, 17 and 18, R. C. M. 1947.

(2) A person convicted of the offense of criminal contempt shall be fined not to exceed five hundred dollars (\$500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both.

**History:** En. 94-7-309 by Sec. 1, Ch. 513, L. 1973.

**Source:** Substantially the same as New York Penal Law, section 215-50; also derived from Revised Codes of Montana 1947, section 94-3540.

#### **Commission Comment**

See "The Increasing Use of the Power of Contempt," John L. Hilts, 32 Mont. L. Rev. 183.

### **DECISIONS UNDER FORMER LAW**

#### **Attorney's Behavior**

Counsel for a witness being examined in court had the right to be heard in his client's behalf, but he did not have the right to abuse his privilege to insult the court or judge, or to interrupt the orderly procedure which should characterize every

judicial investigation. Arbitrary rulings or oppressive conduct on the part of the court would not warrant retaliation by an attorney or resort to undignified or insolent behavior. The law affords him ample redress. In re Mettler, 50 M 299, 146 P 747.



**Change of Judge**

Proceedings for contempt under former section 94-3540 were criminal in nature, even when the basis for the charge was disobedience of an injunction issued in a civil case, and the statute providing for change of judge in civil cases did not apply. *State ex rel. Boston & Montana Consol. Copper & Silver Min. Co. v. Judges*, 30 M 193, 76 P 10.

**Civil Remedy**

On prosecution for criminal contempt under former section 94-3540 for disobedience of a decree, the court had no power to order payment of costs to plaintiffs in the previous action; rather, the court exhausted its power when it imposed a fine of \$500, and any reimbursement of costs must come out of the fine. *State ex rel. Flynn v. District Court*, 24 M 33, 60 P 493.

**Criticism of Courts**

Comment on and criticism of a court's decision, once the matter is no longer pending before the court, was not prohibited by subdivision 7 of former section 94-3540 and is protected by the free speech and free press section of the Constitution.

*State ex rel. Metcalf v. District Court*, 52 M 46, 155 P 278.

**False Publication**

Territorial supreme court had inherent power to protect its processes by punishing for contempt a party who, by publishing unfounded reports of undue influence by his adversaries, attempted to influence the court to hold for him to avoid further charges of corruption. *Territory v. Murray*, 7 M 251, 15 P 145.

Published statement that supreme court, in case still before it, was dealing out injustice and was a party to a "dirty deal" was a false and grossly inaccurate report within the meaning of subdivision 7 of former section 94-3540 and was punishable under the contempt powers of the court. *State ex rel. Haskell v. Faulds*, 17 M 140, 42 P 285.

**Pending Cases**

A case on which the supreme court had handed down a decision but which was still pending on rehearing was still pending for the purposes of contempt, and a false and grossly inaccurate report thereof was punishable as contempt. *In re Nelson*, 103 M 43, 60 P 2d 365.

**Part 4****Official Misconduct**

**94-7-401. Official misconduct.** (1) A public servant commits the offense of official misconduct when, in his official capacity, he commits any of the following acts:

(a) purposely or negligently fails to perform any mandatory duty as required by law or by a court of competent jurisdiction; or

(b) knowingly performs an act in his official capacity which he knows is forbidden by law; or

(c) with the purpose to obtain advantage for himself or another, he performs an act in excess of his lawful authority; or

(d) solicits or knowingly accepts for the performance of any act a fee or reward which he knows is not authorized by law; or

(e) knowingly conducts a meeting of a public agency in violation of section 82-3402.

(2) A public servant convicted of the offense of official misconduct shall be fined not to exceed five hundred dollars (\$500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both.

(3) The district court shall have exclusive jurisdiction in prosecutions under this section, and any action for official misconduct must be commenced by an information filed after leave to file has been granted by the district court or after a grand jury indictment has been found.

(4) A public servant who has been charged as provided in subsection (3) may be suspended from his office without pay pending final judgment.

Upon final judgment of conviction he shall permanently forfeit his office. Upon acquittal he shall be reinstated in his office and shall receive all back pay.

(5) This section does not affect any power conferred by law to impeach or remove any public servant or any proceeding authorized by law to carry into effect such impeachment or removal.

**History:** En. 94-7-401 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 2, Ch. 474, L. 1975.

**Source:** Substantially the same as Illinois Criminal Code, Chapter 38, section 33-3.

#### **Commission Comment**

The intent of this section is to provide criminal sanctions when a public servant intentionally acts in a manner he knows to be contrary to regulation or statute. The existence of the section does not dispute the fundamental premise that inadequate performance in public office should be regulated by civil service.

The section provides punishment for failure to comply with specific mandatory duties set forth outside of the Criminal Code. It also provides punishment for failure to comply with mandatory duties which are set forth in provisions of the Criminal Code.

#### **Amendments**

The 1975 amendment added subdivision (1)(e); and substituted "may be suspended" for "shall be suspended" in subsection (4).

### **DECISIONS UNDER FORMER LAW**

#### **Appeal from District Court**

An order sustaining demurrer to two counts of an accusation under former section 94-5516 was not appealable without a judgment entered thereon, and where trial judge sustained demurrer, then disqualified himself and called in another judge, the successor judge should have entered judgment on the two counts in order to make a final determination which would be appealable. *State ex rel. King v. District Court*, 95 M 400, 26 P 2d 966.

#### **County Attorney Accused**

When an accusation is filed against a county attorney, the district court may appoint another attorney, including a county attorney from a nonadjoining county, to prosecute the accusation, but the prosecuting attorney is not entitled to compensation from the county for his services. *State ex rel. McGrade v. District Court*, 52 M 371, 157 P 1157.

#### **Dealing in Warrants**

Police captain could be removed from office for purchase and redemption of a city warrant in violation of section 59-504, and it was no defense that the purchase was made on behalf of a fellow officer. *State ex rel. O'Brien v. Mayor of Butte*, 54 M 533, 172 P 134.

#### **Disqualification of Judge**

Proceeding under former section 94-5516 for removal of an officer from office was criminal rather than civil in nature, so section 93-901, relating to disqualification of the judge by affidavit, did not apply. *State ex rel. Houston v. District Court*, 61 M 558, 202 P 756.

#### **Fees Charged**

The term "fees" used in former section 94-5516 was broad enough to include both the per diem and reimbursable expenses of a county commissioner. *State ex rel. Payne v. District Court*, 53 M 350, 165 P 294; *State v. Story*, 53 M 537, 165 P 748.

Former section 94-5516, in so far as it related to unlawful fees, was restricted to fees "for services rendered . . . in his office," so that accusation that county commissioner received fees for attending a convention did not come within the section where it was shown that another commissioner was authorized to attend and thus that defendant's attendance was not "in his office." *State ex rel. King v. Smith*, 98 M 171, 38 P 2d 274.

#### **Good Faith**

Former section 94-5516, before the 1917 amendment, did not require a showing that the exaction of unauthorized fees was knowingly made, and it was no defense that the officer charged the fees in good faith and in reliance on the attorney general's advice. *State ex rel. Rowe v. District Court*, 44 M 318, 119 P 1103.

County commissioner charged with receiving illegal fees for supervising road work was virtually deprived of good faith defense allowed by former section 94-5516, after the 1917 amendment, by admission of evidence of attorney general's opinions holding such fees unlawful and of conversations with the county attorney, together with instructions that the attorney general and county attorney were the commissioner's legal advisers and that ignor-



ance of the law was no excuse. *State v. Russell*, 84 M 61, 274 P 148.

The 1917 amendment of former section 94-5516 allowing the good faith defense to officers accused of receiving illegal fees established the public policy of the state, and the governor should have heard evidence on such defense before removing officers removable by him only for cause. *State ex rel. Holt v. District Court*, 103 M 438, 63 P 2d 1026.

Evidence that county surveyor acted with knowledge of members of county airport board and on advice of state examining officer in filing claim under another name for services for which he could not have been paid in his own name tended to establish the good faith defense allowed by the 1917 amendment to former section 94-5516. *State v. Hale*, 126 M 326, 249 P 2d 495.

#### Misfeasance and Malfeasance

Accusations charging school board members with selecting a school site and erecting a building without submitting the matter to the electors, with employing an uncertified teacher, and with issuing warrants not authorized by the county superintendent, charged affirmative acts rather than nonfeasance, and could be brought only under former section 94-5502, which required accusation by grand jury and trial by jury, rather than under former section 94-5516. *State ex rel. Hessler v. District Court*, 64 M 296, 209 P 1052.

Accusation that sheriff actively participated in offenses involving bribery charged malfeasance in office and, where not properly brought under former section 94-5502, was subject to dismissal even though joined with other counts properly brought under former section 94-5516. *State ex rel. Beazley v. District Court*, 75 M 116, 241 P 1075.

In prosecution of sheriff under former section 94-5516 for nonfeasance in not arresting and instituting proceedings against one who offered a bribe, where the evidence showed that the sheriff actively solicited and received bribes but the accusation had not been brought by the grand jury as required by former section 94-5502, the court lost jurisdiction and should have dismissed the charge. *State on Accusation of McNaught v. Beazley*, 77 M 430, 250 P 1114.

#### Neglect of Mandatory Duty

Sheriff could be convicted and removed from office under former section 94-5516 for failure to take any steps to dispel a riot and for failure to attempt to serve bench warrants issued by district court. *State v. Driscoll*, 49 M 558, 144 P 153.

Police captain could be removed from office for failure for three years to file bond required. *State ex rel. O'Brien v. Mayor of Butte*, 54 M 533, 172 P 134.

Accusation that sheriff failed to arrest and institute proceedings against one who offered him a bribe charged nonfeasance, rather than misfeasance or malfeasance, and could be brought under former section 94-5516. *State ex rel. Beazley v. District Court*, 75 M 116, 241 P 1075.

Former section 94-5516, after the 1917 amendment, required that neglect of duty be willful before it would constitute ground for removal from office, and an accusation that failed to allege willfulness should be dismissed. *State ex rel. Arnot v. District Court*, 155 M 344, 472 P 2d 302.

#### Pleadings

Accusation listing fees received by a county commissioner which were unlawful on their face was sufficient. *State ex rel. Payne v. District Court*, 53 M 350, 165 P 294, distinguished in 155 M 344, 348, 472 P 2d 302, 304.

Accusation against county commissioner for collecting illegal fees that quoted a number of items of per diem, mileage and expenses without specifying which portions of which items were excessive or unlawful did not sufficiently apprise defendant of the charges against him and was therefore properly dismissed on special demurrer. *State ex rel. King v. Smith*, 98 M 171, 38 P 2d 274.

#### Prosecution by Attorney General

When the attorney general petitions for the removal of a county officer, he is acting in behalf of the public and even though the prosecution is unsuccessful, the county rather than the attorney general personally is liable for witness fees. *Griggs v. Glass*, 58 M 476, 193 P 564.

#### Survival of Action

Action did not abate on death of officer pending appeal from judgment ousting him from office under former section 94-5516, since the question of his entitlement to the per diem and fees in question, as well as other emoluments accrued since the judgment of ouster, still remained. *State v. Russell*, 84 M 61, 274 P 148.

#### Time for Trial

Accused officer was entitled to dismissal of accusation under former section 94-5516 when it had not been brought to trial within the forty days allowed by that section, even where accused had demanded jury trial under the 1917 amendment. *State ex rel. Galbreath v. District Court*, 108 M 425, 91 P 2d 424.



**Trial by Judge**

Former section 94-5516, providing for removal from office in certain instances, was quasi-criminal in nature, so that the officer was entitled to have his case adjudicated by the trial judge, and supreme court would not issue mandamus requiring his removal on the trial judge's findings. State ex rel. Rowe v. District Court, 44 M 318, 119 P 1103.

Since former section 94-5516 provided for no penalty other than removal from office, there was no right to trial by jury except as provided in that section, even though the proceeding was criminal in nature, and a prosecution for neglect of

mandatory duty was properly triable by the judge alone. State ex rel. Bullock v. District Court, 62 M 600, 205 P 955.

**Value Received**

Under clause in former section 94-5516 permitting officer charged with collecting illegal fees to show the value received by the public body from his services, it was error to exclude evidence of the amounts county would have had to pay by contract to have done the road work for which the officer, a county commissioner, was accused of having received unauthorized fees. State v. Russell, 84 M 61, 274 P 148.

**Part 5****Treason, Flags and Related Offenses****94-7-501. [None.]****Compiler's Notes**

Chapter 513, Laws of 1973, contained no section 94-7-501.

**94-7-502. Desecration of flags.** (1) In this section "flag" means anything which is or purports to be the official flag of the United States, the United States shield, the United States coat of arms, the Montana state flag, or a copy, picture, or representation of any of them.

(2) A person commits the offense of desecration of flags if he purposely or knowingly:

- (a) publicly mutilates, defiles, or casts contempt upon the flag; or
- (b) places on or attaches to the flag any work, mark, design, or advertisement not properly a part of such flag or exposes to public view a flag so altered; or
- (c) manufactures or exposes to public view an article of merchandise or a wrapper or receptacle for merchandise upon which the flag is depicted; or
- (d) uses the flag for commercial advertising purposes.

(3) A person convicted of the offense of desecration of flags shall be imprisoned in the state prison for any term not to exceed ten (10) years.

(4) This section does not apply to flags depicted on written or printed documents or periodicals or on stationery, ornaments, pictures, or jewelry, provided there are not unauthorized words or designs on such flags and provided the flag is not connected with any advertisement.

**History:** En. 94-7-502 by Sec. 1, Ch. 513, L. 1973.

**Source:** Substantially the same as Minnesota Criminal Code, section 609.40.

**Commission Comment**

The section is not intended to prevent giving away flags to customers of a busi-

ness enterprise as a patriotic gesture or placing the names of donors on flags by the Red Cross. United States Code, Title 36, Sections 170 and 171 and subsequent sections prescribe the formalities of using and displaying the flag on various occasions.

**94-7-503. Criminal syndicalism.** (1) "Criminal syndicalism" means the advocacy of crime, malicious damage or injury to property, violence, or other unlawful methods of terrorism as a means of accomplishing industrial or political ends.

(2) A person commits the offense of criminal syndicalism if he purposely or knowingly:

(a) orally or by means of writing, advocates or promotes the doctrine of criminal syndicalism;

(b) organizes or becomes a member of any assembly, group, or organization which he knows is advocating or promoting the doctrine of criminal syndicalism; or

(c) for or on behalf of another whose purpose is to advocate or promote the doctrine of criminal syndicalism, distributes, sells, publishes, or publicly displays any writing advocating or advertising such doctrine.

(3) A person convicted of the offense of criminal syndicalism shall be imprisoned in the state prison for a term not to exceed 10 years.

(4) Whoever, being the owner or in possession or control of any premises, knowingly permits any assemblage of persons to use such premises for the purpose of advocating or promoting the doctrine of criminal syndicalism shall be fined not to exceed \$500 or imprisoned in the county jail for a term not to exceed 6 months, or both.

**History:** En. 94-7-503 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 29, Ch. 359, L. 1977.

**Source:** Substantially the same as Minnesota Statutes Annotated, section 609.405.

#### Commission Comment

The intent of the provision is to provide a more concise statute to deal with those social elements which advocate violence, subversion and destruction by (1) eliminating the cumbersome and convoluted language found in the old sedition statute (R. C. M. 1947, section 94-4401) and (2) modernizing the statute for application to present social needs.

There can be little doubt that the former sedition statute is obsolete. The statute was derived from the Espionage Act of 1917, as amended. (40 Stat. 553) The amended language provided a more detailed delineation of acts causing the offense and broadened immensely the scope of activity that could be included therein. The amendment was passed exclusively as a wartime measure. In upholding the constitutionality of the section, Justice Holmes said in *Schenck v. United States*, 249 US 47, 52, 63 L Ed 470, 39 S Ct 247 (1919) "When a nation is at war, many things that might be said in time of peace are such a hindrance to its effect that those utterances will not be endured so long as men fight, and that no court could regard them as protected by any constitutional right." The Congress of the United States, in keeping with the intent of the section as a wartime measure, repealed it

in 1921 (41 Stat. 1395, 1360) and replaced it with the original act. This, in turn, was repealed in 1948 (62 Stat. 862). The former Montana statute was directly derived from the 1918 amendment to the Espionage Act of 1917. In spite of the federal government's use of the language as a wartime provision, the statute remained intact in Montana for nearly half a century. There is an additional reason for repealing the former sedition statute. In *Commonwealth of Pennsylvania v. Nelson*, 350 US 497, 100 L Ed 640, 76 S Ct 477 (1955) Chief Justice Warren, writing for the majority stated, "The Congress determined in 1940 that it was necessary for it to re-enter the field of antisubversive legislation which it had abandoned in 1921. In that year it enacted the Smith Act which proscribed advocacy of the overthrow of any government — federal, state or local—by force and violence and organization of and knowing membership in a group which so advocates." Referring further to the Internal Security Act of 1950 (50 U.S.C. § 781 et seq.), Warren went on to say, "We examine these Acts only to determine the congressional plan. Looking to all of them in the aggregate, the conclusion is inescapable that Congress has intended to occupy the field of Sedition. Taken as a whole, they evince a congressional plan which makes it reasonable to determine that no room has been left for the states to supplement it. Therefore, a state sedition statute is superseded regardless of whether it purports to sup-

plement the federal law." The opinion also stated that "enforcement of state sedition acts presents a serious danger of conflict with the administration of the federal program."

#### Amendments

The 1977 amendment substituted "whose purpose is" in subsection (2)(c) for "who purposely thereby"; and made minor changes in phraseology, punctuation and style.

**94-7-504. Bringing armed men into the state.** (1) A person commits the offense of bringing armed men into the state when he knowingly brings, or aids in bringing, into this state an armed person or armed body of men for the purpose of engaging in criminal or socially disruptive activities or to usurp the powers of law enforcement authorities.

(2) A person convicted of the offense of bringing armed men into the state shall be imprisoned in the state prison for a term not to exceed ten (10) years.

**History:** En. 94-7-504 by Sec. 1, Ch. 513, L. 1973.

**Source:** Derived from Revised Codes of Montana 1947, sections 94-3524 and 94-3920.

#### Commission Comment

This is intended to deal with those individuals who would bring criminal and politically adverse elements into Montana to carry on criminal or socially disruptive activities, or to take over duties of law enforcement authorities.

## CHAPTER 8

### OFFENSES AGAINST PUBLIC ORDER

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- 94-8-220. When residents of contiguous state may purchase rifles or shotguns in Montana.
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## Part One

## Offensive, Indecent and Inhumane Conduct

**94-8-101. Disorderly conduct.** (1) A person commits the offense of disorderly conduct if he knowingly disturbs the peace by:

- (a) quarreling, challenging to fight or fighting; or
- (b) making loud or unusual noises; or
- (c) using threatening, profane or abusive language; or
- (d) discharging firearms; or
- (e) rendering vehicular or pedestrian traffic impassable; or
- (f) rendering the free ingress or egress to public or private places impassable; or
- (g) disturbing or disrupting any lawful assembly or public meeting; or
- (h) transmitting a false report or warning of a fire, impending explosion or other catastrophe in such a place that its occurrence would endanger human life; or
- (i) creating a hazardous or physically offensive condition by any act that serves no legitimate purpose.

(2) A person convicted of the offense of disorderly conduct shall be fined not to exceed one hundred dollars (\$100) or be imprisoned in the county jail for a term not to exceed ten (10) days, or both.

**History:** En. 94-8-101 by Sec. 1, Ch. 513, L. 1973.

**Source:** New.

## Commission Comment

There appeared to have been no distinct crime known as disorderly conduct at common law. Some of the acts now included by statute in this category fell under the general heading of breaches of the peace such as fighting or causing a disturbance which would tend to provoke fighting among those present.

In many jurisdictions statutes have developed which go beyond merely preventing breaches of the peace. Included generally are acts which offend others or annoy them or create resentment without necessarily leading to a breach of peace. The crime of disorderly conduct appears to be directed at curtailing that kind of behavior which disrupts and disturbs the peace and quiet of the community by

various kinds of annoyances. These acts standing alone may not be criminal under other categories such as theft, or assault and battery, or libel, etc. The difficulty is in defining the conduct which falls within these objectives, for a given act under some circumstances is not objectionable, while under others it is. Thus sounding a horn at a carnival is not objectionable. But sounding it at midnight in a residential section might be. The intent of the provision is to use somewhat broad, general terms to establish a foundation for the offense and leave the application to the facts of a particular case. Two important qualifications are specified in making the application, however. First, the offender must knowingly make a disturbance of the enumerated kind, and second, the behavior must disturb "others." It is not sufficient that a single person or a very few persons have grounds for complaint.

## DECISIONS UNDER FORMER LAW

## Disturbing the Peace

Evidence that defendant was slapping his pistol against his leg in an agitated manner, that he unholstered the weapon and pointed it at another and threatened

to shoot him and that he spat at that person's departing automobile was sufficient to support conviction of disturbing the peace. *State v. Turley*, — M —, 521 P 2d 690.

**94-8-102. Failure of disorderly persons to disperse.** (1) Where two (2) or more persons are engaged in disorderly conduct, a peace officer, judge or mayor may order the participants to disperse. A person who pur-

posely refuses or knowingly fails to obey such an order commits the offense of failure to disperse.

(2) A person convicted of the offense of failure to disperse shall be fined not to exceed one hundred dollars (\$100) or be imprisoned in the county jail for a term not to exceed ten (10) days, or both.

**History:** En. 94-8-102 by Sec. 1, Ch. 513, L. 1973.

**Source:** New.

#### **Commission Comment**

State statutes commonly penalize refusal to disperse when ordered to do so by those in authority and present at the

scene of an unlawful assembly. The elements of the offense are that at least two persons be involved and that the group members must purposely refuse or fail to disperse when they are ordered to do so by an official of the law or one given authority by law.

### **DECISIONS UNDER FORMER LAW**

#### **Civil Liability**

Former sections 94-5304 and 94-5305, requiring the sheriff to command rioters to disperse and to arrest those who do not

disperse, did not impose civil liability on the sheriff for damages sustained because of his neglect of this duty. *Annala v. McLeod*, 122 M 498, 206 P 2d 811.

**94-8-103. Riot.** (1) A person commits the offense of riot if he purposely and knowingly disturbs the peace by engaging in an act of violence or threat to commit an act of violence as part of an assemblage of five (5) or more persons, which act or threat presents a clear and present danger of, or results in, damage to property or injury to persons.

(2) A person convicted of the offense of riot shall be fined not to exceed five hundred dollars (\$500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both.

**History:** En. 94-8-103 by Sec. 1, Ch. 513, L. 1973.

**Source:** New.

#### **Commission Comment**

The common-law misdemeanor, "unlawful assembly," was a gathering of three or more persons with the common purpose of committing an unlawful act. When an act was done toward carrying out this pur-

pose, the offense was "riot." The actual beginning of the perpetration of the unlawful act became "riot." All states penalize some form of unlawful assembly or riot. The section follows the common law with the exception of the number of people involved and the inclusion of the language "purposely and knowingly," which is the standard mens rea requirement in the code.

**94-8-104. Incitement to riot.** (1) A person commits the offense of incitement to riot if he purposely and knowingly commits an act or engages in conduct that urges other persons to riot. Such act or conduct shall not include the mere oral or written advocacy of ideas, or expression of belief, which advocacy or expressions does not urge the commission of an act of immediate violence.

(2) A person convicted of the offense of incitement to riot shall be fined not to exceed five hundred dollars (\$500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both.

**History:** En. 94-8-104 by Sec. 1, Ch. 513, L. 1973.

**Source:** New.

#### **Commission Comment**

This section introduces a new concept

to the Montana Criminal Code. The intent of the section is to specifically define an offense which might otherwise be covered in another part of the code.

It is conceivable that an act constituting incitement to riot would be covered



under the inchoate offense of solicitation. However, with the increase in the general social upheaval in many jurisdictions, a single statute specifically prohibiting incitement to riot might provide more effective law enforcement. Preventing a riot before substantial injury to property and persons has occurred is the only practical method of dealing with such social unrest,

for after the substantive offenses are committed, and a riot is in progress, normal law enforcement procedures are generally unworkable and the tactics used by enforcement officials to restore order often extend beyond that which may be considered a reasonable use of force under the circumstances.

#### 94-8-105. Repealed.

##### Repeal

Section 94-8-105 (Sec. 1, Ch. 513, L.

1973), relating to public intoxication, was repealed by Sec. 4, Ch. 403, Laws 1975.

**94-8-106. Cruelty to animals.** (1) A person commits the offense of cruelty to animals if without justification he knowingly or negligently subjects an animal to mistreatment or neglect by:

(a) overworking, beating, tormenting, injuring or killing any animal; carrying any animal in a cruel manner; or

(b) failing to provide an animal in his custody with proper food, drink, or shelter; or

(c) abandoning any helpless animal or abandoning any animal on any highway, railroad or in any other place where it may suffer injury, hunger or exposure or become a public charge; or

(d) promoting, sponsoring, conducting or participating in a horse race of more than two (2) miles; or promoting, sponsoring, or conducting or participating in any fight between any animals.

(2) A person convicted of the offense of cruelty to animals shall be fined not to exceed five hundred dollars (\$500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both.

**History:** En. 94-8-106 by Sec. 1, Ch. 513, L. 1973.

**Source:** Derived from the proposed Michigan Code, section 5565; also derived from Model Penal Code, section 250.11.

##### Commission Comment

Subdivision (1)(c) covers instances in which a person knowingly and negligently releases or abandons a wild or semi-wild animal in a populated area where it will not be able to fend for itself.

**94-8-107. Public nuisance.** (1) "Public nuisance" means:

(a) a condition which endangers safety or health, is offensive to the senses, or obstructs the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood or by any considerable number of persons;

(b) any premises where persons gather for the purpose of engaging in unlawful conduct; or

(c) a condition which renders dangerous for passage any public highway or right-of-way or waters used by the public.

(2) A person commits the offense of maintaining a public nuisance if he knowingly creates, conducts, or maintains a public nuisance.

(3) Any act which affects an entire community or neighborhood or any considerable number of persons (as specified in subsection (1)(a)) is no

less a nuisance because the extent of the annoyance or damage inflicted upon individuals is unequal.

(4) A person convicted of maintaining a public nuisance shall be fined not to exceed \$500 or imprisoned in the county jail for a term not to exceed 6 months, or both. Each day of such conduct constitutes a separate offense.

(5) Action to abate a public nuisance.

(a) Every public nuisance may be abated and the persons maintaining such nuisance and the possessor of the premises who permits the same to be maintained may be enjoined from such conduct by an action in equity in the name of the state of Montana by the county attorney or any resident of the state.

(b) Upon the filing of the complaint in such action the judge may issue a temporary injunction.

(c) In such action evidence of the general reputation of the premises is admissible for the purpose of proving the existence of the nuisance.

(d) If the existence of the nuisance is established, an order of abatement shall be entered as part of the judgment in the case. The judge issuing the order may, in his discretion:

(i) confiscate all fixtures used on the premises to maintain the nuisance and either sell them and transmit the proceeds to the county general fund, destroy them, or return them to their rightful ownership;

(ii) close the premises for any period not to exceed 1 year, during which period the premises shall remain in the custody of the court;

(iii) allow the premises to be opened upon posting bond sufficient in amount to assure compliance with the order of abatement. The bond shall be forfeited if the nuisance is continued or resumed. The procedure for forfeiture or discharge of the bond shall be as provided in 95-1116; or

(iv) any combination of the above.

**History:** En. 94-8-107 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 30, Ch. 359, L. 1977.

**Source:** New.

#### Commission Comment

The phrase "any considerable number of persons" as used in the provision will undoubtedly be subject to court interpretation. The phrase has not been interpreted by any Montana case to date. The New York Court of Appeals held that "The expression 'any considerable number of persons' is used solely for the purpose of differentiating a public nuisance, which is subject to indictment, from a private nuisance. But a considerable number of persons does not necessarily mean a very great or any particular number of persons." *People v. Kings County Iron Foundry*, 209 NY 530, 102 NE 598, 599 (1913).

The offense of "nuisance," in some ways, resembles disorderly conduct in its requirement that the proscribed conduct annoy, alarm or inconvenience the public or "a considerable number of persons" however disorderly conduct relates to

existing acts or acts of brief duration while nuisance usually involves the creation or maintenance of a continuing condition. In practical application, most criminal nuisance cases fall into two categories: (1) the maintenance of manufacturing plants, entertainment resorts and the like, which by virtue of excessive noise, noxious gases, etc., annoy or offend groups or areas of the community; and (2) the conduct of resorts where people gather for illegal or immoral purposes. Subdivision (1)(a) deals with the first category. One difficulty of this offense is the fine balancing of the relative rights of plant operators or business people on the one hand and the residents of the vicinity on the other. The problem is accentuated by the fact that "public nuisance," as defined and construed, requires little if any criminal intent, being virtually a crime of absolute liability.

#### Amendments

The 1977 amendment substituted "public nuisance" in subsection (5)(a) for "prem-



ise upon which a public nuisance is being maintained"; inserted "of the premises" in subsection (5)(a); and made minor

changes in phraseology, punctuation and style.

### DECISIONS UNDER FORMER LAW

#### Burden of Proof

An action in equity to abate a nuisance initiated under former section 94-1003 was a civil action and the burden resting on the state was proof by a preponderance of the evidence only. State ex rel. Lamey v. Young, 72 M 408, 234 P 248.

Where the evidence overwhelmingly established gambling activities on the premises and there was virtually no contradictory evidence, supreme court would reverse judgment dismissing action to abate nuisance and would direct entry of judgment of abatement, including a perpetual injunction against use of premises for gambling. State ex rel. Nagle v. Naughton, 103 M 306, 63 P 2d 123.

#### Closing of Premises

Closing of an entire three-story building was justified on evidence that previous lesser attempts to abate unlawful activities had failed and that the operation of all parts of the building were connected with the unlawful activities. State ex rel. Lamey v. Young, 72 M 408, 234 P 248.

Where stipulated facts established that gambling operations had been conducted on premises in violation of perpetual injunction ordered by supreme court thirteen years before, but sheriff's return reported that he found no gambling equipment there, order would be entered closing premises for a year and restraining defendants from removing any gambling equipment. State ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P 2d 1029.

#### Complaint

Complaint initiating an action in equity under former section 94-1003 was sufficient if verified as required by that section, and it was not necessary that it comply with the requirements of section 93-4205 that the allegations be made positively, rather than on belief, as required for temporary injunction in other types of cases. State ex rel. Bergland v. Bradley, 124 M 434, 225 P 2d 1024.

#### Destruction of Property

Order directing sheriff to sell equipment confiscated was erroneous where such equipment was gambling equipment of the type described in section 94-8-404, since under section 94-8-411 such equipment is to be destroyed. State ex rel. Replogle v. Joyland Club, 124 M 122, 220 P 2d 988.

#### Good Faith

Defendants could not plead good faith

compliance with unconstitutional statute purporting to authorize certain types of lotteries when they had not paid the tax or license fees required by those same statutes; in any event, good faith was relevant only in applying for release of the premises for lawful use. State ex rel. Harrison v. Deniff, 126 M 109, 245 P 2d 140.

#### Order of Abatement

Order abating nuisance was not required, as a prerequisite or concurrent with closing of the premises, to order confiscation of the fixtures. State ex rel. Lamey v. Young, 72 M 408, 234 P 248.

Trial court should have included in the order abating a nuisance and confiscating equipment a description of the fixtures and equipment confiscated, and where there was evidence as to the equipment used in illegal activities, it was immaterial that the complaint did not describe it. State ex rel. Bottomly v. Johnson, 116 M 483, 154 P 2d 262.

An order closing the premises and ordering confiscation of personal property was a final judgment and could not be entered while a motion to strike portions of the complaint was still pending. State ex rel. Harrison v. Baker, 135 M 180, 340 P 2d 142.

#### Parties Defendant

Owner of building could not complain that a particular lessee of part had not been made a party to abatement action initiated under former section 94-1003. State ex rel. Lamey v. Young, 72 M 408, 234 P 248.

#### Parties Plaintiff

The fact that the nominal complainant in an abatement action under former section 94-1003 was an attorney and had been paid by an undisclosed person to file the action and testify as a witness was not ground for questioning his motives or the credibility of his testimony. State ex rel. Leahy v. O'Rourke, 115 M 502, 146 P 2d 168.

#### Permitting Nuisance

Finding that the owner of a place knew of and permitted unlawful conduct therein was justified by evidence of its general reputation for gambling and unlawful sale of liquor, that owner knew of several arrests for unlawful activities and on one occasion assumed responsibility for per-



sons arrested, that owner leased to persons previously involved in illegal activities, and that on learning of violations, owner failed to terminate leases immediately but merely failed to renew when the leases expired several months later. State ex rel. Lamey v. Young, 72 M 408, 234 P 248.

#### Reputation Evidence

Testimony as to the general reputation of a place was admissible in an abatement action initiated under former section 94-1003 and tended directly to prove knowledge on the part of the owner. State ex rel. Lamey v. Young, 72 M 408, 234 P 248.

#### Temporary Injunction

Under former section 94-1004, the district court was required, on a prima facie showing of unlawful gambling on the

premises, to issue a temporary injunction which should be effective at least until the hearing on the order to show cause, and an order quashing the temporary injunction before that time was appealable. State ex rel. Olsen v. 30 Club, 124 M 91, 219 P 2d 307.

#### Unlawful Conduct

Gambling, prostitution and unlawful sale of liquor were proper grounds for an abatement action initiated under former section 94-1003. State ex rel. Lamey v. Young, 72 M 408, 234 P 248.

Former section 94-1002, defining nuisances, was designed to include lotteries, as defined by section 94-8-301, as well as other forms of gambling. State ex rel. Leahy v. O'Rourke, 115 M 502, 146 P 2d 168.

**94-8-108. Creating a hazard.** (1) A person commits the offense of creating a hazard if he knowingly:

(a) discards in any place where it might attract children a container having a compartment of more than  $1\frac{1}{2}$  cubic feet capacity and a door or lid that locks or fastens automatically when closed and cannot easily be opened from the inside and fails to remove the door, lid, or locking or fastening device;

(b) being the owner or otherwise having possession of property upon which there is a well, cistern, cesspool, mine shaft, or other hole of a depth of 4 feet or more and a top width of 12 inches or more, fails to cover or fence it with a suitable protective construction;

(c) tampers with an aircraft without the consent of the owner;

(d) being the owner or otherwise having possession of property upon which there is a steam engine or steam boiler, continues to use a steam engine or steam boiler which is in an unsafe condition;

(e) being a person in the act of game hunting, acts in a negligent manner or knowingly fails to give all reasonable assistance to any person whom he has injured; or

(f) deposits any hard substance upon or between any railroad tracks which will tend to derail railroad cars or other vehicles.

(2) A person convicted of the offense of creating a hazard shall be fined not to exceed \$500 or imprisoned in the county jail for a term not to exceed 6 months, or both.

**History:** En. 94-8-108 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 31, Ch. 359, L. 1977.

**Source:** Substantially the same as proposed Michigan Code, section 7505.

#### Commission Comment

The section is designed primarily to protect children, unsuspecting or handicapped adults and injured hunting victims. In addition it deals with several unrelated and somewhat unique problems in impos-

ing criminal liability on aircraft meddlers, railroad derailleurs and possessors of steam engines or steam boilers. The mens rea requirement for each offense is "knowingly" and the penalty is a misdemeanor only.

#### Amendments

The 1977 amendment made minor changes in phraseology, punctuation and style.

DECISIONS UNDER FORMER LAW

**Civil Liability**

Failure to put a cover over or a fence around an open shaft as required by former section 94-35-125 was negligence per se and made the landowner liable for injuries sustained in a fall even by a trespasser. *Conway v. Monidah Trust*, 47 M 269, 132 P 26.

**Trench**

Former section 94-35-125 did not apply to a temporary trench opened for the laying of sewer pipe, even though more than ten feet deep. *McLaughlin v. Bardsen*, 50 M 177, 145 P 954.

**94-8-109. Failure to yield party line.** (1) Any person who fails to relinquish a telephone party line or public pay telephone after he has been requested to do so to permit another to place an emergency call to a fire department or police department, or for medical aid or ambulance service, shall be imprisoned for a term not to exceed ten (10) days or fined not to exceed twenty-five dollars (\$25), or both.

(2) It is a defense to prosecution under subsection (1) that the accused did not know or did not have reason to know of the emergency in question, or that the accused was himself using the telephone party line or public pay telephone for such an emergency call.

(3) Any person who requests another to relinquish a telephone party line or public pay telephone on the pretext that he must place an emergency call knowing such pretext to be false, shall be imprisoned for a term not to exceed ten (10) days or fined not to exceed twenty-five dollars (\$25), or both.

(4) Every telephone company doing business in this state shall print a copy of subsections (1), (2) and (3) of this section in each telephone directory published by it after the effective date of this section.

**History:** En. 94-8-109 by Sec. 1, Ch. 513, L. 1973.

**Source:** Substantially the same as Revised Codes of Montana 1947, sections 94-35-221.1, 94-35-221.2, 94-35-221.3 and 94-35-221.4.

**Commission Comment**

This section is a recodification of old laws dealing with party lines.

**94-8-110. Obscenity.** (1) A person commits the offense of obscenity when, with knowledge of the obscene nature thereof, he purposely or knowingly:

(a) Sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene to anyone under the age of eighteen (18); or

(b) Presents or directs an obscene play, dance or other performance or participates in that portion thereof which makes it obscene to anyone under the age of eighteen (18); or

(c) Publishes, exhibits or otherwise makes available anything obscene to anyone under the age of eighteen (18); or

(d) Performs an obscene act or otherwise presents an obscene exhibition of his body to anyone under the age of eighteen (18); or

(e) Creates, buys, procures or possesses obscene matter or material with the purpose to disseminate it to anyone under the age of eighteen (18); or

(f) Advertises or otherwise promotes the sale of obscene material or materials represented or held out by him to be obscene.

(2) A thing is obscene if:

(a) it is a representation or description of perverted ultimate sexual acts, actual or simulated, or

(b) it is a patently offensive representation or description of normal ultimate sexual acts, actual or simulated, or

(c) it is a patently offensive representation or description of masturbation, excretory functions or lewd exhibition of the genitals, and

(d) taken as a whole the material:

(i) applying contemporary Montana standards, appeals to the prurient interest in sex,

(ii) portrays conduct described in (a), (b), or (c) above in a patently offensive way, and

(iii) lacks serious literary, artistic, political or scientific value.

(3) In any prosecution for an offense under this section evidence shall be admissible to show:

(a) The predominant appeal of the material, and what effect if any, it would probably have on the behavior of people;

(b) The artistic, literary, scientific, educational or other merits of the material;

(c) The degree of public acceptance of the material in this state;

(d) Appeal to prurient interest, or absence thereof, in advertising or other promotion of the material; or

(e) Purpose of the author, creator, publisher or disseminator.

(4) A person convicted of obscenity shall be fined at least five hundred dollars (\$500) but not more than one thousand dollars (\$1,000), or imprisoned in the county jail for a term not to exceed six (6) months, or both.

(5) No city or municipal ordinance may be adopted which is more restrictive as to obscenity than the provisions of this section and section 94-8-110.1.

**History:** En. 94-8-110 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 1, Ch. 407, L. 1975.

**Source:** Substantially the same as Illinois Criminal Code, Chapter 38, section 11-20.

#### Commission Comment

This section closely follows section 11-20 of the Illinois Criminal Code, which is essentially the same as the American Law Institute Model Penal Code Draft. Slight changes in wording were undertaken in recognition that today's society often condones literature, movies and other art which may incidentally provide erotic stimulation. The significant difference between this section and the prior provisions is that a violation cannot occur unless the

obscene art is specifically directed to a person under the age of majority with the exception of subdivision (1)(f) which is aimed at "pandering", using its common definition.

#### Amendments

The 1975 amendment rewrote subsection (2) which read: "A thing is obscene if: (a) the dominant theme of the material taken as a whole appeals to a prurient interest, that is, a shameful or morbid interest in violence, nudity, sex or excretion; and (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without re-



deeming social value"; substituted "at least five hundred dollars (\$500) but not more than one thousand dollars (\$1,000)" in subsection (4) for "not to exceed five hundred dollars (\$500)"; added subsection (5); and made a minor change in phraseology.

holding that applicable standards for determination of obscenity are those of the "community" in which the regulation is imposed do not render this section unconstitutional in so far as it invalidates local ordinances in conflict with it. *U.S. Mfg. & District Corp. v. City of Great Falls*, — M —, 546 P 2d 522.

#### Constitutionality

United States Supreme Court decisions

**94-8-110.1. Public display of offensive material.** (1) A person is guilty of public display of offensive sexual material when, with knowledge of its character and content, he displays or permits to be displayed in or on any window, showcase, newsstand, display rack, wall, door, billboard, marquee or similar place, any pictorial, three-dimensional or other visual representation of a person or a portion thereof of the human body that predominantly appeals to prurient interest in sex, and is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and is utterly without redeeming social importance for minors; and does not

(a) separate that material by an opaque structure from other materials displayed, and

(b) establish, by official identification, that each person viewing the displayed material is at least eighteen (18) years of age.

(2) A theater may not display previews or projections advertising or promoting motion pictures if such previews or projections contain a display of offensive sexual or offensive violent material and if minors are permitted to attend the showing of the motion picture then being featured.

(3) For purposes of this section, "offensive violent material" means material which is so violent as to be patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors.

(4) A drive-in movie screen may not display any material prohibited by subsection (1) in such manner that the display is easily visible from any public street, sidewalk, thoroughfare or transportation facility.

(5) A person convicted of the public display of offensive sexual material or convicted of otherwise violating this section shall be fined at least five hundred dollars (\$500) but not more than one thousand dollars (\$1,000), or imprisoned in the county jail for a term not to exceed six (6) months, or both.

**History:** En. Secs. 1 to 3, Ch. 463, L. 1973; R. C. M. 1947, Supp., Secs. 94-3624 to 94-3626; amd. Sec. 2, Ch. 407, L. 1975; amd. Sec. 1, Ch. 391, L. 1977.

#### Title of Act

An act prohibiting the public display of offensive sexual material, with definition of terms; and providing for a penalty.

#### Compiler's Notes

This section was not a part of the Criminal Code of 1973, but is derived from a separate 1973 act. The compiler has placed the section here in the interest of logical arrangement and, in so doing, has inserted subsection designations in the style used in the Criminal Code of 1973.

#### Amendments

The 1975 amendment deleted "drive-in movie screen" after "billboard" in subsection (1); deleted "in such manner that the display is easily visible from or in any public street, sidewalk, or thoroughfare or transportation facility" after "marquee or similar place" in subsection (1); added

"and does not" and subdivisions (a) and (b) to subsection (1); inserted subsection (3); designated former subsection (3) as (4); and increased the fine in subsection (4) from "not to exceed five hundred dollars (\$500)" to "at least five hundred dollars (\$500) but not more than one thousand dollars (\$1,000)."

The 1977 amendment inserted "or offensive violent" before "material" in subsection (2); inserted subsection (3); redesignated former subsections (3) and (4) as subsections (4) and (5); substituted "subsection (1)" in subsection (4) for "this section"; and inserted "or convicted of otherwise violating this section" in subsection (5).

#### Separability Clause

Section 4 of Ch. 463, Laws 1973 read "It is the intent of the legislature that if a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid application."

#### Effective Date

Section 3 of Ch. 407, Laws 1975 provided the act should be in effect from and after its passage and approval. Approved April 14, 1975.

### 94-8-110.2. Sale and advertisement of contraceptive drugs and devices.

(1) It is unlawful for any person, firm, corporation, partnership, or association to sell, offer for sale, or give away, by means of vending machines, personal or collective distribution, solicitation, or peddling or in any other manner whatsoever, contraceptive drugs or devices, prophylactic rubber goods, or other articles for the prevention of venereal diseases. This subsection does not apply to regularly licensed practitioners of medicine or osteopathy, other licensed persons practicing other healing arts, registered pharmacists, or wholesale drug jobbers or manufacturers who sell to retail stores only.

(2) It is unlawful to:

(a) exhibit or display prophylactics or contraceptives in any show window, upon the streets, or in any public place, other than in the place of business of a licensed pharmacist;

(b) advertise such in any magazine, newspaper, or other form of publication originating in or published within the state of Montana;

(c) publish or distribute from house to house or upon the streets any circular, booklet, or other form of advertising of prophylactics or contraceptives; or

(d) advertise such by other visual means, auditory method, or radio broadcast or by the use of outside signs on stores, billboards, window displays, or other advertising visible to persons upon the streets or public highways.

(3) Nothing in this section prevents the advertising of prophylactics or contraceptives in the trade press, those magazines whose principal circulation is to the medical and pharmaceutical professions, or those magazines and other publications having interstate circulation or originating outside of the state of Montana where the advertising does not violate any United States law or federal postal regulation.

(4) Nothing in this section prevents the furnishing within the store or place of business of a licensed pharmacist to persons qualified to purchase, and then only upon their inquiry, such printed or other information as is requisite to proper use in relation to any merchandise coming within the provisions of this section.

(5) Nothing in this section prevents the dissemination of medically acceptable contraceptive information by printed or other methods concerning the availability and use of any merchandise coming within the provisions of this section.

(6) Any officer of the law may cause the arrest of a person violating any provision of this section, seize stocks illegally held, and seize any mechanical device or vending machine containing any merchandise coming within the provisions of this section, holding the owner of the machine and the occupier and owner of the premises where seizure is made to be in violation of this section.

(7) Any person, any member of a firm or partnership, or the officers of a corporation or association who knowingly violate any of the provisions of this section are guilty of a misdemeanor and shall, upon conviction, be punished by a fine not to exceed \$500 or by imprisonment not to exceed 6 months in the county jail, or both.

(8) Justice of the peace courts and the district courts of the state have concurrent jurisdiction in all prosecutions and causes arising under this section.

**History:** En. Secs. 1 to 4, Ch. 430, L. 1973; R. C. M. 1947, Supp., Secs. 94-3620 to 94-3623; amd. Sec. 32, Ch. 359, L. 1977.

#### Compiler's Notes

This section was not part of the Criminal Code of 1973, but is based on a separate 1973 act. The compiler has placed it here in the interest of logical arrangement and, in so doing, has inserted subsection numbers in the style used in the Criminal Code of 1973.

#### Title of Act

An act to be codified in chapter 15, Title

66, R. C. M. 1947, relating to the sale and advertisement of contraceptive drugs and devices; providing penalties; and repealing sections 94-3616, 94-3617, 94-3618 and 94-3619, R. C. M. 1947.

#### Amendments

The 1977 amendment made minor changes in style, phraseology and punctuation.

#### Repealing Clause

Section 5 of Ch. 430, Laws 1973 read "Sections 94-3616, 94-3617, 94-3618 and 94-3619, R. C. M. 1947, are repealed."

**94-8-110.3. Certain motion picture theater employees not liable for prosecution.** (1) As used in this section, "employee" means any person regularly employed by the owner or operator of a motion picture theater if he has no financial interest other than salary or wages in the ownership or operation of the motion picture theater, no financial interest in or control over the selection of the motion pictures shown in the theater, and is working within the motion picture theater where he is regularly employed but does not include a manager of the motion picture theater.

(2) No employee is liable to prosecution under sections 94-8-110 and 94-8-110.1, R. C. M. 1947, or under any city or county ordinance for exhibiting or possessing with intent to exhibit any obscene motion picture provided the employee is acting within the scope of his regular employment at a showing open to the public.

**History:** En. 94-8-110.3 by Sec. 1, Ch. 76, L. 1974.

#### Title of Act

An act relating to motion picture theater employees and obscene motion pictures.



**94-8-111. Criminal defamation.** (1) Defamatory matter is anything which exposes a person or a group, class or association to hatred, contempt, ridicule, degradation or disgrace in society, or injury to his or its business or occupation.

(2) Whoever with knowledge of its defamatory character, orally, in writing or by any other means, communicates any defamatory matter to a third person without the consent of the person defamed commits the offense of criminal defamation and may be sentenced to imprisonment for not more than six (6) months in the county jail or a fine of not more than five hundred dollars (\$500), or both.

(3) Violation of subsection (2) is justified if:

(a) the defamatory matter is true and is communicated with good motives and for justifiable ends; or

(b) the communication is absolutely privileged; or

(c) the communication consists of fair comment made in good faith with respect to persons participating in matters of public concern; or

(d) the communication consists of a fair and true report or a fair summary of any judicial, legislative or other public or official proceedings; or

(e) the communication is between persons each having an interest or duty with respect to the subject matter of the communication and is made with the purpose to further such interest or duty.

(4) No person shall be convicted on the basis of an oral communication of defamatory matter except upon the testimony of at least two (2) other persons that they heard and understood the oral statement as defamatory or upon a plea of guilty.

**History:** En. 94-8-111 by Sec. 1, Ch. 513, L. 1973.

**Source:** Identical to Minnesota Statutes Annotated, section 609.765.

#### **Commission Comment**

The law of criminal libel has been based upon two divergent, and often confused, policy considerations. The first is that personal reputations should be protected from injury by punishing the communication of

scandalous matter. The second is that breaches of the peace which might be caused by the publication of such matter can be avoided by punishing the publication. This section has the main function of preserving personal reputations by assimilating the nearly one dozen statutes now involved in present provisions, and by clearing up the traditionally confusing language associated with the statutes.

### **DECISIONS UNDER FORMER LAW**

#### **Public Officer**

Statements leading to necessary inference that township constable had acted unlawfully in attachment, had formed a collusive partnership with a bill collector,

and had been guilty of graft in the administration of the affairs of his office was libelous within the meaning of former section 94-2801. *State v. Winterrowd*, 77 M 74, 249 P 664.

**94-8-112. Bribery in contests.** (1) A person commits the offense of bribery in contests if he purposely or knowingly offers, confers, or agrees to confer upon another, or solicits, accepts, or agrees to accept from another:

(a) any pecuniary benefit as a consideration for the recipient's failure to use his best efforts in connection with any professional or amateur athletic contest, sporting event or exhibition; or

(b) any benefit as consideration for a violation of a known duty as a person participating in, officiating or connected with any professional or amateur athletic contest, sporting event or exhibition.

(2) A person convicted of the offense of bribery in contests shall be fined not to exceed five thousand dollars (\$5,000) or be imprisoned in the state prison for a term not to exceed ten (10) years, or both.

**History:** En. 94-8-112 by Sec. 1, Ch. 513, L. 1973.

**Source:** Substantially the same as Illinois Criminal Code, Chapter 38, section 29-1.

#### Commission Comment

The bribery of a participant in a sporting event constitutes an activity sufficiently deceitful to warrant criminal sanctions. The purpose of this section is two-fold. First, by preventing the offer and acceptance of bribes it attempts to protect the moral character of participants and officials from influence and corruption.

Second, through the use of criminal sanctions, the economic and psychological ill effects of "fixed" contests are sought to be avoided. The general phrase "failure to use his best efforts in connection with (a contest)" is intended to cover any conduct whereby a participant tries to lose the contest, lower the margin of victory, establish a point spread, etc., or, in the case of an official or other person, conduct whereby he deliberately misjudges, dishonestly referees or supervises, or otherwise unfairly attempts to influence the outcome of the contest. The section has no counterpart in the old Montana Criminal Code.

**94-8-113. Mistreating prisoners.** (1) A person commits the offense of mistreating prisoners if, being responsible for the care or custody of a prisoner, he purposely or knowingly:

(a) assaults or otherwise injures a prisoner; or

(b) intimidates, threatens, endangers or withholds reasonable necessities from the prisoner with the purpose to obtain a confession from him, or for any other purpose; or

(c) violates any civil right of a prisoner.

(2) A person convicted of the offense of mistreating prisoners shall be removed from office or employment and imprisoned in the state prison for a term not to exceed ten (10) years.

**History:** En. 94-8-113 by Sec. 1, Ch. 513, L. 1973.

**Source:** New.

#### Commission Comment

This section replaces R. C. M. 1947, sections 94-3917, "Inhumanity to prisoners," and 94-3918, "Confessions obtained by duress or inhuman practices." The purpose of the section is to provide more concise terminology for offenses against prisoners. Thus, the terms assault, intimidation, threat, endanger and withhold are clearer

and more meaningful than "inhumanity" or "inhuman practices."

The maximum punishment provided in the provision is ten (10) years and removal from office. The severe punishment is based on two premises: (1) the relatively helpless circumstance of a prisoner subjected to such treatment, and (2) the policy that a sentence to imprisonment should be rehabilitative in nature. Clearly, little rehabilitation or reorientation to social norms can be accomplished when those responsible for the custody and care of prisoners mistreat them.

**94-8-114. Privacy in communications.** (1) A person commits the offense of violating privacy in communications if he knowingly or purposely:

(a) with the purpose to terrify, intimidate, threaten, harass, annoy, or offend, communicates with any person by telephone and uses any obscene, lewd, or profane language, suggests any lewd or lascivious act, or threatens to inflict injury or physical harm to the person or property of any person

(the use of obscene, lewd, or profane language or the making of a threat or lewd or lascivious suggestions is prima facie evidence of an intent to terrify, intimidate, threaten, harass, annoy, or offend);

(b) uses a telephone to attempt to extort money or any other thing of value from any person or to disturb by repeated telephone calls the peace, quiet, or right of privacy of any person at the place where the telephone call or calls are received;

(c) records or causes to be recorded any conversation by use of a hidden electronic or mechanical device which reproduces a human conversation without the knowledge of all parties to the conversation. Subsection (c) does not apply to duly elected or appointed public officials or employees when the transcription or recording is done in the performance of official duty, to persons speaking at public meetings, or to persons given warning of the recording;

(d) by means of any machine, instrument, or contrivance or in any other manner:

(i) reads or attempts to read any message or learn the contents thereof while it is being sent over a telegraph line;

(ii) learns or attempts to learn the contents of any message while it is in a telegraph office or is being received thereat or sent therefrom; or

(iii) uses, attempts to use, or communicates to others any information so obtained;

(e) discloses the contents of a telegraphic message or any part thereof addressed to another person without the permission of such person, unless directed to do so by the lawful order of a court; or

(f) opens or reads or causes to be read any sealed letter not addressed to himself without being authorized to do so by either the writer of the letter or the person to whom it is addressed or, without the like authority, publishes any of the contents of the letter knowing the same to have been unlawfully opened.

(2) A person convicted of the offense of violating privacy in communications shall be fined not to exceed \$500 or imprisoned in the county jail for a term not to exceed 6 months, or both.

**History:** En. 94-8-114 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 33, Ch. 359, L. 1977.

**Source:** Derived from Revised Codes of Montana 1947, sections 94-3203, 94-3320, 94-3321, 94-3323, 94-35-220, 94-35-221.5, 94-35-274 and 94-35-275.

#### **Commission Comment**

This statute is merely a recodification of the old Montana law. A comprehensive electronic surveillance proposal was defeated by the 1971 state legislature.

#### **Amendments**

The 1977 amendment substituted sub-

section (1)(a) for "Communicates with any person by telephone with the intent to terrify, intimidate, threaten, harass, annoy or offend, or use any obscene, lewd or profane language or suggest any lewd or lascivious act, or threaten to inflict injury or physical harm to the person or property of any person"; deleted a second sentence from subsection (1)(b) which now appears in parentheses in subsection (1)(a); inserted "any conversation" in the first sentence of subsection (1)(c); and made minor changes in style, phraseology and punctuation.



**Part Two****Weapons**

**94-8-201. (11317.1) Definitions.** In 94-8-202 through 94-8-208 the following definitions apply:

(1) "Machine gun" means a weapon of any description by whatever name known, loaded or unloaded, from which more than six shots or bullets may be rapidly, automatically, or semiautomatically discharged from a magazine by a single function of the firing device.

(2) "Crime of violence" means any of the following crimes or an attempt to commit any of the same: any forcible felony, robbery, burglary, and criminal trespass.

(3) "Person" includes a firm, partnership, association, or corporation.

**History:** En. Sec. 1, Ch. 43, L. 1935; Sec. 94-3101, R. C. M. 1947; redes. 94-8-201 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 34, Ch. 359, L. 1977.

**Amendments**

The 1977 amendment inserted the introductory phrase and numerical subdivision designations; substituted "any forcible

felony" in subdivision (2) for "murder, manslaughter, kidnaping, rape, mayhem, assault to do great bodily harm"; substituted "and criminal trespass" in subdivision (2) for "housebreaking, breaking and entering, and larceny"; and made minor changes in style, phraseology and punctuation.

**94-8-202. (11317.2) Possession or use of machine gun—when unlawful.** Possession or use of a machine gun in the perpetration or attempted perpetration of a crime of violence is hereby declared to be a crime punishable by imprisonment in the state penitentiary for a term of not less than twenty years.

**History:** En. Sec. 2, Ch. 43, L. 1935; Sec. 94-3102, R. C. M. 1947; redes. 94-8-202 by Sec. 29, Ch. 513, L. 1973.

**94-8-203. (11317.3) Punishment for possession or use of machine gun for offensive purpose.** Possession or use of a machine gun for offensive or aggressive purpose is hereby declared to be a crime punishable by imprisonment in the state penitentiary for a term of not less than ten years.

**History:** En. Sec. 3, Ch. 43, L. 1935; Sec. 94-3103, R. C. M. 1947; redes. 94-8-203 by Sec. 29, Ch. 513, L. 1973.

**94-8-204. (11317.4) Presumption of offensive or aggressive purpose.** Possession or use of a machine gun shall be presumed to be for offensive or aggressive purpose:

(1) when the machine gun is on premises not owned or rented for bona fide permanent residence or business occupancy by the person in whose possession the machine gun may be found;

(2) when the machine gun is in the possession of or used by a person who has been convicted of a crime of violence in any court of record, state or federal, in the United States of America or its territories or insular possessions;

(3) when the machine gun is of the kind described in 94-8-208 and has not been registered as required in that section; or

(4) when empty or loaded pistol shells of 30 (.30 in. or 7.63 mm.) or larger caliber which have been or are susceptible of being used in the machine gun are found in the immediate vicinity thereof.

**History:** En. Sec. 4, Ch. 43, L. 1935;  
Sec. 94-3104, R. C. M. 1947; amd. and redes.  
94-8-204 by Sec. 26, Ch. 513, L. 1973; amd.  
Sec. 35, Ch. 359, L. 1977.

#### Compiler's Notes

The previous text of this section may be found under sec. 94-3104 in bound Volume Eight.

#### Amendments

The 1973 amendment renumbered this section; and substituted the reference to section 94-8-208 in subdivision (c) for a reference to section 94-3108.

The 1977 amendment redesignated subdivisions (a) through (d) as (1) through (4); deleted "an unnaturalized foreign-born person, or" before "a person" in subdivision (2); and made minor changes in phraseology and punctuation.

**94-8-205. (11317.5) Presence of gun as evidence of possession or use.** The presence of a machine gun in any room, boat, or vehicle shall be evidence of the possession or use of the machine gun by each person occupying the room, boat, or vehicle where the weapon is found.

**History:** En. Sec. 5, Ch. 43, L. 1935;  
Sec. 94-3105, R. C. M. 1947; redes. 94-8-205  
by Sec. 29, Ch. 513, L. 1973.

**94-8-206. (11317.6) Exceptions.** Nothing contained in this act shall prohibit or interfere with:

1. The manufacture for, and sale of, machine guns to the military forces or the peace officers of the United States or of any political subdivision thereof, or the transportation required for that purpose;

2. The possession of a machine gun for scientific purpose, or the possession of a machine gun not usable as a weapon and possessed as a curiosity, ornament, or keepsake;

3. The possession of a machine gun other than one adapted to use pistol cartridges of 30 (.30 in. or 7.63 mm.) or larger caliber, for a purpose manifestly not aggressive or offensive.

**History:** En. Sec. 6, Ch. 43, L. 1935;  
Sec. 94-3106, R. C. M. 1947; redes. 94-8-206  
by Sec. 29, Ch. 513, L. 1973.

**94-8-207. (11317.7) Manufacturer to keep register of machine guns—contents—inspection—penalty for failure to keep.** Every manufacturer shall keep a register of all machine guns manufactured or handled by him. This register shall show the model and serial number, date of manufacture, sale, loan, gift, delivery or receipt, of every machine gun, the name, address, and occupation of the person to whom the machine gun was sold, loaned, given or delivered, or from whom it was received; and the purpose for which it was acquired by the person to whom the machine gun was sold, loaned, given or delivered, or from whom received. Upon demand every manufacturer shall permit any marshal, sheriff or police officer to inspect his entire stock of machine guns, parts, and supplies therefor, and shall

produce the register, herein required, for inspection. A violation of any provision of this section shall be punishable by a fine of not less than one hundred dollars (\$100.00).

History: En. Sec. 7, Ch. 43, L. 1935;  
Sec. 94-3107, R. C. M. 1947; redes. 94-8-207  
by Sec. 29, Ch. 513, L. 1973.

**94-8-208. (11317.8) Registration of machine guns now in state and hereafter acquired—presumption from failure to register.** Every machine gun now in this state adapted to use pistol cartridges of 30 (.30 in. or 7.63 mm.) or larger caliber shall be registered in the office of the secretary of state, on the effective date of this act, and annually thereafter. If acquired hereafter it shall be registered within twenty-four hours after its acquisition. Blanks for registration shall be prepared by the secretary of state, and furnished upon application. To comply with this section the application as filed must show the model and serial number of the gun, the name, address and occupation of the person in possession, and from whom and the purpose for which, the gun was acquired. The registration data shall not be subject to inspection by the public. Any person failing to register any gun as required by this section, shall be presumed to possess the same for offensive or aggressive purpose.

History: En. Sec. 8, Ch. 43, L. 1935;  
Sec. 94-3108, R. C. M. 1947; redes. 94-8-208  
by Sec. 29, Ch. 513, L. 1973.

**Cross-References**

Registration functions transferred to department of law enforcement, sec. 82A-1203.

**94-8-209. (11317.10) Uniformity of interpretation.** This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

History: En. Sec. 11, Ch. 43, L. 1935;  
Sec. 94-3110, R. C. M. 1947; redes. 94-8-209  
by Sec. 29, Ch. 513, L. 1973.

**94-8-209.1. Destructive device and explosive defined.** (1) "Destructive device", as used in this chapter, includes but is not limited to the following weapons:

(a) a projectile containing an explosive or incendiary material or any other similar chemical substance, including, but not limited to, that which is commonly known as tracer or incendiary ammunition, except tracer ammunition manufactured for use in shotguns;

(b) a bomb, grenade, explosive missile, or similar device or a launching device therefor;

(c) a weapon of a caliber greater than .60 caliber which fires fixed ammunition or any ammunition therefor, other than a shotgun or shotgun ammunition;

(d) a rocket, rocket-propelled projectile, or similar device of a diameter greater than 0.60 inch, or a launching device therefor and a rocket, rocket-propelled projectile, or similar device containing an explosive or incendiary material or any other similar chemical substance other than the propellant for the device, except devices designed primarily for emergency or distress signaling purposes;



(e) a breakable container which contains a flammable liquid with a flashpoint of 150 degrees Fahrenheit or less and which has a wick or similar device capable of being ignited, other than a device which is commercially manufactured primarily for the purpose of illumination.

(2) "Explosive", as used in this chapter, means any explosive defined in 69-1901.

**History:** En. Sec. 1, Ch. 304, L. 1971; Sec. 69-1931, R. C. M. 1947; amd. and redes. 94-8-209.1 by Sec. 72, Ch. 359, L. 1977.

#### **Title of Act**

An act relating to possession of explosives and destructive devices with intent

to injure persons or property; setting penalties therefor.

#### **Amendments**

The 1977 amendment inserted "similar" before "chemical substance" in subdivisions (1)(a) and (1)(d); and made minor changes in phraseology and punctuation.

**94-8-209.2. Possession of a destructive device.** (1) A person who, with the purpose to commit a felony, has in his possession any destructive device on a public street or highway, in or near any theater, hall, school, college, church, hotel, other public building, or private habitation, in, on, or near any aircraft, railway passenger train, car, vessel engaged in carrying passengers for hire, or other public place ordinarily passed by human beings is guilty of the offense of possession of a destructive device.

(2) A person convicted of the offense of possession of a destructive device shall be imprisoned in the state prison for a period of not more than 10 years.

**History:** En. Sec. 2, Ch. 304, L. 1971; Sec. 69-1932, R. C. M. 1947; amd. and redes. 94-8-209.2 by Sec. 73, Ch. 359, L. 1977.

#### **Amendments**

The 1977 amendment deleted "or any explosive" after "destructive device" in subsection (1); substituted "the offense of possession of a destructive device" at the

end of subsection (1) for "a felony"; designated the penalty clause as subsection (2); inserted "A person convicted of the offense of possession of a destructive device" at the beginning of subsection (2); substituted "imprisoned" in subsection (2) for "punishable by imprisonment"; and made minor changes in phraseology and style.

**94-8-209.3. Possession of explosives.** (1) A person commits the offense of possession of explosives if he possesses, manufactures, transports, buys, or sells an explosive compound, flammable material, or timing, detonating, or similar device for use with an explosive compound or incendiary device and:

(a) has the purpose to use such explosive, material, or device to commit an offense; or

(b) knows that another has the purpose to use such explosive, material, or device to commit an offense.

(2) A person convicted of the offense of possession of explosives shall be imprisoned in the state prison for any term not to exceed 20 years.

**History:** En. 94-6-105 by Sec. 1, Ch. 513, L. 1973; amd. and redes. 94-8-209.3 by Sec. 74, Ch. 359, L. 1977.

**Source:** Substantially the same as Illinois Criminal Code, Chapter 38, section 20-2.

#### **Commission Comment**

This section is intended to consolidate R. C. M. 1947, section 94-3304, "Destruction of buildings by explosive—punishment," and the various applicable provisions included in Title 69, chapter 19, Explosives, Regulation of Manufacture,

Storage and Sale. The act is prohibited only when it is done with the intent to commit an offense or with knowledge that another intends to use the explosives to commit an offense.

#### Amendments

The 1977 amendment inserted "buys, or

sells" in subsection (1); inserted "flammable material" in subsection (1); inserted "similar" before "device" in subsection (1); inserted "material" in subdivisions (1)(a) and (1)(b); and made minor changes in phraseology, punctuation and style.

**94-8-209.4. Possession of a silencer.** (1) A person commits the offense of possession of a silencer if he possesses, manufactures, transports, buys, or sells a silencer and has the purpose to use it to commit an offense or knows that another person has such a purpose.

(2) A person convicted of the offense of possession of a silencer is punishable by imprisonment in the state prison for a term of not less than 5 years or more than 30 years or a fine of not less than \$1,000 or more than \$20,000 or by both such fine and imprisonment.

**History:** En. 94-8-209.4 by Sec. 75, Ch. 359, L. 1977.

**94-8-209.5. Possession prima facie evidence of unlawful purpose.** Possession of a silencer or of a bomb or similar device charged or filled with one or more explosives is prima facie evidence of a purpose to use the same to commit an offense.

**History:** En. 94-8-209.5 by Sec. 76, Ch. 359, L. 1977.

#### Repealing Clause

Section 77 of Ch. 359, Laws 1977 read

"Sections 69-1916, 94-5-601, 94-5-611, 94-5-612, 94-6-101, 94-6-301, 94-7-101, 94-7-201, 94-8-223, 94-8-224, and 94-8-225, R. C. M. 1947, are repealed."

**94-8-210. (11302) Carrying concealed weapons.** (1) Every person who carries or bears concealed upon his person a dirk, dagger, pistol, revolver, slingshot, sword cane, billy, knuckles made of any metal or hard substance, knife having a blade 4 inches long or longer, razor, not including a safety razor, or other deadly weapon shall be punished by a fine not exceeding \$500 or imprisonment in the county jail for a period not exceeding 6 months, or both.

(2) A person who has previously been convicted of an offense, committed on a different occasion than the offense under this section, in this state or any other jurisdiction for which a sentence to a term of imprisonment in excess of 1 year could have been imposed and who carries or bears concealed upon his person any of the weapons described in subsection (1) shall be punished by a fine not exceeding \$1,000 or imprisoned in the state prison for a period not exceeding 5 years, or both.

**History:** Earlier acts were Sec. 1, p. 62, L. 1883; re-en. Sec. 66, 4th Div. Comp. Stat. 1887; amd. Sec. 758, Pen. C. 1895; re-en. Sec. 8582, Rev. C. 1907; amd. Sec. 1, Ch. 58, L. 1911.

This section en. Sec. 1, Ch. 74, L. 1919; re-en. Sec. 11302, R. C. M. 1921; Sec. 94-3525, R. C. M. 1947; redes. 94-8-210 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 36, Ch. 359, L. 1977; amd. Sec. 1, Ch. 411, L. 1977.

#### Compiler's Notes

This section was amended twice in 1977, once by Ch. 359 and once by Ch. 411. Since the amendments do not appear to conflict, the Code Commissioner has made a composite section embodying the changes made by both amendments.

#### Amendments

Chapter 359, Laws of 1977, substituted "prison" for "penitentiary" near the end

of the section; and made minor changes in phraseology, punctuation and style.

Chapter 411, Laws of 1977, designated the former section as subsection (1); deleted "within the limits of any city or town" after "Every person who" at the beginning of the section; deleted "or may be punished by imprisonment in the state prison for a period not exceeding five years" at the end of subsection (1); and added subsection (2).

#### Repealing Clause

Section 2 of Ch. 411, Laws 1977, read

### 94-8-211. (11303) Repealed.

#### Repeal

Section 94-8-211 (Sec. 2, Ch. 74, L. 1919; Sec. 29, Ch. 513, L. 1973), relating to carrying concealed weapons outside cities

"Section 94-8-211, R. C. M. 1947, is repealed."

#### Permit

In assault prosecution based on use of a gun taken by defendant from his pocket, it was not error to instruct jury that it was crime to carry a concealed weapon without a permit, even in the absence of evidence that defendant did not have a permit; existence of a permit would have been an affirmative defense. *State v. Lewis*, 157 M 452, 486 P 2d 863.

and towns, was repealed by Sec. 2, Ch. 411, Laws 1977. For current provision, see sec. 94-8-210.

**94-8-212. (11304) Exceptions.** Sections 94-8-210 and 94-8-211 do not apply to:

- (1) any peace officer of the state of Montana;
- (2) any officer of the United States government authorized to carry a concealed weapon;
- (3) a person in actual service as a national guardsman;
- (4) a person summoned to the aid of any of the persons named in subsections (1) through (3);
- (5) a civil officer or his deputy engaged in the discharge of official business;
- (6) a person authorized by a judge of a district court of this state to carry a weapon; or
- (7) the carrying of arms on one's own premises or at one's home or place of business.

**History:** En. Sec. 3, Ch. 74, L. 1919; re-en. Sec. 11304, R. C. M. 1921; Sec. 94-3527, R. C. M. 1947; amd. Sec. 1, Ch. 63, L. 1969; amd. Sec. 1, Ch. 54, L. 1971; redes. 94-8-212 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 37, Ch. 359, L. 1977.

#### Amendments

The 1971 amendment added item 17, relating to national park service rangers.

The 1977 amendment substituted "Sections 94-8-210 and 94-8-211" at the beginning of the section for "The preceding sections"; deleted former subdivisions 1 through 8, 10, 16 and 17 which read "1. A sheriff or his deputy; 2. A marshal or his deputy; 3. A constable or his deputy; 4. A police officer or policeman; 5. A

United States marshal or his deputy; 6. A person in the secret service of the United States; 7. A game warden or his deputy; 8. A U. S. forest reserve official or his deputy; 10. A revenue officer or his deputy; 16. United States immigration and naturalization service officer; 17. National park service rangers"; redesignated former subdivisions 15, 9, and 11 through 14 as present subdivisions (1) and (3) through (7), respectively; inserted present subdivision (2); substituted "any of the persons named in subsections (1) through (3)" in subdivision (4) for "either of the foregoing named persons"; and made minor changes in phraseology and punctuation.

**94-8-213. Possession of weapon by prisoner.** Every prisoner committed to the Montana state prison, who, while at such state prison, or while being conveyed to or from the Montana state prison, or while at a state prison



farm or ranch, or while being conveyed to or from any such place, or while under the custody of prison officials, officers or employees, possesses or carries upon his person or has under his custody or control without lawful authority, a dirk, dagger, pistol, revolver, slingshot, swordcane, billy, knuckles made of any metal or hard substance, knife, razor, not including a safety razor, or other deadly weapon, is guilty of a felony and shall be punishable by imprisonment in the state prison for a term not less than five (5) years nor more than fifteen (15) years. Such term of imprisonment to commence from the time he would have otherwise been released from said prison.

History: En. Sec. 1, Ch. 131, L. 1961;  
Sec. 94-3527.1, R. C. M. 1947; redes. 94-8-  
213 by Sec. 29, Ch. 513, L. 1973.

**94-8-214. (11306) Permits to carry concealed weapons—records—revocation.** (1) Any judge of a district court of this state may grant permission to carry or bear, concealed or otherwise, a pistol or revolver for a term not exceeding 1 year.

(2) All applications for such permission must be made by petition filed with the clerk of the district court. No charge may be made for the filing of the petition.

(3) The applicant shall, if personally unknown to the judge, furnish proof by a credible witness of his good moral character and peaceable disposition.

(4) No such permission shall be granted any person who is not a citizen of the United States and who has not been an actual bona fide resident of the state of Montana for 6 months immediately next preceding the date of such application.

(5) A record of permission granted shall be kept by the clerk of the court. The record shall state the date of the application, the date of the permission, the name of the person to whom permission is granted, the name of the judge granting the permission, and the name of the person, if any, by whom good moral character and peaceable disposition are proved. The record must be signed by the person who is granted such permission.

(6) The clerk shall thereupon issue under his hand and the seal of the court a certificate, in a convenient card form so that the same may be carried in the pocket, stating:

"Permission to ..... authorizing him to carry or bear, concealed or otherwise, a pistol or revolver for the period of ..... from the date hereof, has been granted by ....., a judge of the district court of the ..... judicial district of the state of Montana, in and for the county of .....

"Witness the hand of the clerk and the seal of said court this ..... day of ....., 19....

.....  
Clerk."

(7) The date of the certificate shall be the date of the granting of such

permission. The certificate shall bear upon its face the signature of the person receiving the same.

(8) Upon good cause shown the judge granting such permission may, in his discretion without notice to the person receiving such permission, revoke the same. The date of the revocation shall be noted by the clerk upon the record kept by him.

(9) All permissions to carry or bear concealed weapons granted before March 3, 1919, are hereby revoked.

**History:** En. Sec. 5, Ch. 74, L. 1919; re-en. Sec. 11306, R. C. M. 1921; Sec. 94-3529, R. C. M. 1947; redes. 94-8-214 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 38, Ch. 359, L. 1977.

#### Amendments

The 1977 amendment inserted the subsection designations; substituted "granted before March 3, 1919" in subsection (9) for "heretofore granted"; and made minor changes in style, phraseology and punctuation.

**94-8-215. (11307) Definition of concealed weapons.** Concealed weapons shall mean any weapon mentioned in the foregoing sections, which shall be wholly or partially covered by the clothing or wearing apparel of the person so carrying or bearing the weapon.

**History:** En. Sec. 6, Ch. 74, L. 1919; 3530, R. C. M. 1947; redes. 94-8-215 by Sec. re-en. Sec. 11307, R. C. M. 1921; Sec. 94-29, Ch. 513, L. 1973.

**94-8-216. (11308) Definition of unincorporated town.** A town, if unincorporated, within the meaning of this act, shall consist of at least ten dwellings situated so that no one of said buildings is distant from another more than one hundred yards.

**History:** En. Sec. 7, Ch. 74, L. 1919; 3531, R. C. M. 1947; redes. 94-8-216 by re-en. Sec. 11308, R. C. M. 1921; Sec. 94-Sec. 29, Ch. 513, L. 1973.

**94-8-217. (11309) Jurisdiction of courts.** The district courts shall have original jurisdiction in all criminal actions for violations of the provisions of this act.

**History:** En. Sec. 8, Ch. 74, L. 1919; 3532, R. C. M. 1947; redes. 94-8-217 by re-en. Sec. 11309, R. C. M. 1921; Sec. 94-Sec. 29, Ch. 513, L. 1973.

**94-8-218. (11530) Firing firearms.** Every person who willfully shoots or fires off a gun, pistol, or any other firearm within the limits of any town or city or of any private inclosure which contains a dwelling house is punishable by a fine not exceeding \$25.

**History:** En. Secs. 1, 2, p. 46, Ex. L. 1873; re-en. Sec. 185, 4th Div. Rev. Stat. 1879; re-en. Sec. 228, 4th Div. Comp. Stat. 1887; amd. Sec. 1161, Pen. C. 1895; re-en. Sec. 8834, Rev. C. 1907; re-en. Sec. 11530, R. C. M. 1921; Sec. 94-3578, R. C. M. 1947; redes. 94-8-218 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 39, Ch. 359, L. 1977.

#### Amendments

The 1977 amendment inserted "other"

before "firearm"; and made minor changes in punctuation and style.

#### Cities and Towns

An illustration is found in this section of legislative use of "city or town" under circumstances which would render it absurd to hold that only incorporated cities and towns are meant. State ex rel. Powers v. Dale, 47 M 227, 131 P 670.

**94-8-219. When Montana residents may purchase rifles or shotguns in contiguous states.** Residents of Montana may purchase any rifle or rifles

and shotgun or shotguns in a state contiguous to Montana, provided that such residents conform to the applicable provisions of the federal Gun Control Act of 1968, and regulations thereunder, as administered by the United States secretary of the treasury, and provided further, that such residents conform to the provisions of law applicable to such purchase in Montana and in the state in which the purchase is made.

**History:** En. Sec. 1, Ch. 87, L. 1969; Sec. 94-3578.1, R. C. M. 1947; redes. 94-8-219 by Sec. 29, Ch. 513, L. 1973.

**Compiler's Note**

The federal Gun Control Act of 1968, referred to in this section, is the act of October 22, 1968, P. L. 90-618, compiled at 18 U.S.C. 921-928.

**94-8-220. When residents of contiguous state may purchase rifles or shotguns in Montana.** Residents of a state contiguous to Montana may purchase any rifle or rifles and shotgun or shotguns in Montana, provided that such residents conform to the applicable provisions of the federal Gun Control Act of 1968, and regulations thereunder, as administered by the United States secretary of the treasury, and provided further that such residents conform to the provisions of law applicable to such purchase in Montana and in the state in which such persons reside.

**History:** En. Sec. 2, Ch. 87, L. 1969; Sec. 94-3578.2, R. C. M. 1947; redes. 94-8-220 by Sec. 29, Ch. 513, L. 1973.

**94-8-221. (11565) Use of firearms by children under age fourteen prohibited.** It is unlawful for a parent, guardian, or other person having charge or custody of a minor child under the age of 14 years to permit the minor child to carry or use in public any firearms of any description loaded with powder and lead, except when the child is accompanied by a person having charge or custody of the child or under the supervision of a qualified firearms safety instructor who has been authorized by the parent or guardian.

**History:** En. Sec. 1, Ch. 111, L. 1907; Sec. 8879, Rev. C. 1907; re-en. Sec. 11565, R. C. M. 1921; Sec. 94-3579, R. C. M. 1947; amd. Sec. 1, Ch. 139, L. 1963; redes. 94-8-221 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 40, Ch. 359, L. 1977.

**Amendments**

The 1977 amendment substituted "accompanied by a person having charge or custody of the child" for "in the company of such parent or guardian"; and made minor changes in phraseology and punctuation.

**94-8-222. (11566) Liability of parent or guardian.** Any parent, guardian, or other person, violating the provisions of this act shall be guilty of a misdemeanor, and the county attorney, on complaint of any person, must prosecute violations of this act.

**History:** En. Sec. 2, Ch. 111, L. 1907; Sec. 8880, Rev. C. 1907; re-en. Sec. 11566, R. C. M. 1921; Sec. 94-3580, R. C. M. 1947; redes. 94-8-222 by Sec. 29, Ch. 513, L. 1973.

**94-8-223 to 94-8-225. (11281 to 11283) Repealed.**

**Repeal**

Sections 94-8-223 to 94-8-225 (Secs. 1 to 3, Ch. 6, Ex. L. 1918; Sec. 29, Ch. 513,

L. 1973), relating to silencers and explosives, were repealed by Sec. 77, Ch. 359, Laws 1977.



**94-8-226. Switchblade knives—possession, selling, using, giving, or offering for sale—penalty—collectors.** Every person who carries or bears upon his person or who carries or bears within or on any motor vehicle or other means of conveyance owned or operated by him or who owns, possesses, uses, stores, gives away, sells or offers for sale, a switchblade knife shall be punished by a fine not exceeding five hundred dollars (\$500.00) or by imprisonment in the county jail for a period not exceeding six (6) months or by both such fine and imprisonment; provided, that a bona fide collector, whose collection is registered with the sheriff of the county in which said collection is located, is hereby exempted from the provisions of this act. For the purpose of this section a switchblade knife is defined as any knife which has a blade one and one-half (1½) inches long or longer, which opens automatically by hand pressure applied to a button, spring or other device in the handle of the knife.

**History:** En. Sec. 1, Ch. 243, L. 1957; Sec. 94-35-273, R. C. M. 1947; redes. 94-8-226 by Sec. 29, Ch. 513, L. 1973.

### Part Three

#### Lotteries

**94-8-301. (11149) Lottery defined.** A lottery is any scheme for the disposal or distribution of property by chance among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it or for any share or interest in such property upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, gift enterprise, or by whatever name the same may be known.

**History:** En. Sec. 580, Pen. C. 1895; re-en. Sec. 8406, Rev. C. 1907; re-en. Sec. 11149, R. C. M. 1921; amd. Sec. 1, Ch. 36, L. 1935; Sec. 94-3001, R. C. M. 1947; redes. 94-8-301 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 17, Ch. 508, L. 1977; Cal. Pen. C. Sec. 319.

#### Amendments

The 1977 amendment deleted "raffle or" before "gift" near the end of the section; and made minor changes in punctuation.

#### Bank Night

In an action by the state to enjoin the operation of "bank night" drawings as a lottery under this section, submitted on an agreed statement of facts wherein it was stipulated among other matters that "the money that is used for the purpose of purchasing the defense bond is received from the rental of the store and office properties of the defendant corporation in the theater buildings, and not from the sale of admission tickets to the theater," held, on the facts presented, that the scheme did not constitute a lottery, and second part of section 2, article XIX of

the 1889 constitution was not self-executing. State ex rel. Stafford v. Fox-Great Falls Theatre Corp., 114 M 52, 57, 70, 132 P 2d 689, overruling State ex rel. Dussault v. Fox Missoula Theatre Corp., 110 M 441, 101 P 2d 1065.

#### Bingo and Keno

The game of "keno" was held to be a lottery and prohibited by this law. Gambling is a generic term, embracing within its meaning all forms of play or game for stakes wherein one or the other participating stands to win or lose as a matter of chance. Play at lottery is gambling. State ex rel. Leahy v. O'Rourke, 115 M 502, 146 P 2d 168.

#### Cash Prize or Merchandise

To constitute a lottery, it is immaterial whether the prize be given in cash or in merchandise so long as it was awarded by chance and a consideration paid for that chance. State v. Hahn, 105 M 270, 72 P 2d 459, overruled on other grounds in State v. Bosch, 125 M 566, 242 P 2d 477.

### Numbers Games

A numbers game, whether called Chinese lottery, "The Crown Game," "The Crown punchboard game" or any other name is a lottery. State ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P 2d 1029.

### Punch Boards

Punch boards constitute a lottery. State ex rel. Harrison v. Deniff, 126 M 109, 245 P 2d 140.

In an action for violation of this section there was no defense that the defendant had offered to pay for the operation of such punch boards in accordance with chapter 201, Laws 1951, which purported to license trade stimulators such as punch boards, since it was not competent for the legislature to authorize lotteries in view of section 2, article 19 of the 1889 constitution and the case of State ex rel. Harrison v. Deniff. State v. Tursich, 127 M 504, 267 P 2d 641, 642.

### Requisites of Lottery

The legal requisites necessary to charge the offense of operating a lottery under this section are the offering of a prize, the awarding of the prize by chance, and the giving of a consideration for an opportunity to win the prize. State v. Hahn, 105 M 270, 72 P 2d 459, overruled on other grounds in State v. Bosch, 125 M 566, 242 P 2d 477.

### Skill Ball

Where county attorney first set out his charge in the language of this section and then proceeded to set out in detail the game, while it was conceivable that in pursuing this method a prosecutor could plead himself out of court by detailing facts which when challenged by demurrer would show themselves to be without the ban of the statute, it was not true of this information because the essential elements were supplied by the particulars. State v. Hahn, 105 M 270, 72 P 2d 459, overruled on other grounds in State v. Bosch, 125 M 566, 242 P 2d 477.

**94-8-302. (11149.1) Application.** This part shall not apply to the provisions of 62-715 through 62-726 or to the giving away of cash or merchandise attendance prizes or premiums by public drawings at agricultural fairs or rodeo associations in this state, and the county fair commissioners of agricultural fairs or rodeo associations in this state may give away at such fairs cash or merchandise attendance prizes or premiums by public drawings.

**History:** En. Sec. 2, Ch. 36, L. 1935; Sec. 94-3002, R. C. M. 1947; redes. 94-8-302 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 18, Ch. 508, L. 1977.

### Skill or Chance

To defeat a charge of conducting a lottery (styled "skill ball") it is not enough that some skill is involved in the game; the test to be applied in determining whether a game is one of skill or chance being, is not whether it contains an element of skill or an element of chance, but which of the two is the dominating element that determines the result of the game. State v. Hahn, 105 M 270, 72 P 2d 459, overruled on other grounds in State v. Bosch, 125 M 566, 242 P 2d 477.

### Slot Machines

The operation of a slot machine is a lottery and banned by the criminal laws of this state. State v. Marek, 124 M 178, 220 P 2d 1017; State v. Read, 124 M 184, 220 P 2d 1020; State ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P 2d 1029.

### Valuable Consideration

The words "pay" a "valuable consideration" used in this section are not synonymous with furnishing a good consideration required as the basis for an enforceable contract according to the context, and their approved usage. "Consideration" is defined by section 13-501 as that which is paid to the promisor "as an inducement." What can be obtained free cannot be said to have been induced by a consideration; hence one purchasing an admission ticket in order to obtain a chance to win which he can have free of charge, does not pay consideration for the gratuity. State ex rel. Stafford v. Fox-Great Falls Theatre Corp., 114 M 52, 132 P 2d 689.

Where one is required to make an outlay of money in order to participate in a scheme whereby an award is made by chance, the participant pays valuable consideration for the chance to participate, notwithstanding the fact he may also receive merchandise at the same time that the outlay is made. State v. Cox, 136 M 507, 349 P 2d 104.

### Amendments

The 1977 amendment substituted "This part shall not apply to the provisions of 62-715 through 62-726 or" at the beginning of the section for "This act shall not apply."



**94-8-303. (11150) Punishment for drawing lottery.** Every person who contrives, prepares, sets up, proposes, or draws any lottery is guilty of a misdemeanor.

History: En. Sec. 581, Pen. C. 1895; re-en. Sec. 8407, Rev. C. 1907; re-en. Sec. 11150, R. C. M. 1921; Sec. 94-3003, R. C. M. 1947; redes. 94-8-303 by Sec. 29, Ch. 513, L. 1973.

lottery and banned by the criminal laws of this state. State v. Marek, 124 M 178, 220 P 2d 1017; State v. Read, 124 M 184, 220 P 2d 1020; State ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P 2d 1029.

#### Slot Machines

The operation of a slot machine is a

**94-8-304. (11151) Punishment for selling lottery tickets.** Every person who sells, gives, or in any manner whatever furnishes or transfers to or for any other person, any ticket, chance, share or interest or any paper, certificate or instrument purporting or understood to be or to represent any ticket, chance, share or interest in, or depending upon the event of any lottery is guilty of a misdemeanor.

History: En. Sec. 582, Pen. C. 1895; re-en. Sec. 8408, Rev. C. 1907; re-en. Sec. 11151, R. C. M. 1921; Sec. 94-3004, R. C. M. 1947; redes. 94-8-304 by Sec. 29, Ch. 513, L. 1973. Cal. Pen. C. Sec. 321.

8-301) the sole question under the pleadings was whether a lottery was being conducted, not whether defendant was violating this section; hence where the evidence failed to prove the existence of a lottery, the claim advanced thereafter on appeal that there was also a violation of this section, became immaterial. State ex rel. Stafford v. Fox-Great Falls Theatre Corp., 114 M 52, 132 P 2d 689.

#### Nonexistent Lottery

In a proceeding to enjoin a theater corporation from operating "bank night" drawings as a nuisance under the lottery statute, section 94-3001 (renumbered 94-

**94-8-305. (11152) Aiding lotteries.** Every person who aids or assists, either by printing, writing, advertising, publishing or otherwise, in setting up, managing or drawing any lottery or in selling or disposing of any ticket, chance, or share therein, is guilty of a misdemeanor.

History: En. Sec. 583, Pen. C. 1895; re-en. Sec. 8409, Rev. C. 1907; re-en. Sec. 11152, R. C. M. 1921; Sec. 94-3005, R. C.

M. 1947; redes. 94-8-305 by Sec. 29, Ch. 513, L. 1973. Cal. Pen. C. Sec. 322.

**94-8-306. (11153) Lottery offices—advertising lottery offices.** Every person who opens, sets up or keeps, by himself, or by any other person, any office or any other place for the sale of, or for registering the number of any ticket in any lottery within or without this state, or who by printing, writing, or otherwise, advertises or publishes the setting up, opening, or using of, any such office is guilty of a misdemeanor.

History: En. Sec. 584, Pen. C. 1895; re-en. Sec. 8410, Rev. C. 1907; re-en. Sec. 11153, R. C. M. 1921; Sec. 94-3006, R. C.

M. 1947; redes. 94-8-306 by Sec. 29, Ch. 513, L. 1973. Cal. Pen. C. Sec. 323.

**94-8-307. (11154) Insuring lottery tickets—publishing offers to insure.** Every person who insures or receives any consideration for insuring for or against the drawing of any ticket in any lottery whatever, whether drawn or to be drawn within this state or not, or who receives any valuable consideration upon any agreement to repay any sum or deliver the same, or any other property if any lottery ticket or number of any ticket in any lottery shall prove fortunate or unfortunate, or shall be drawn or not be drawn at



any particular time, or in any particular order, or who promises or agrees to pay any sum of money, or to deliver any goods, things in action or property, or to forbear to do anything for the benefit of any person, with or without consideration, upon any event or contingency, dependent on the drawing of any ticket in any lottery, or who publishes any notice or proposal of any of the purposes aforesaid, is guilty of a misdemeanor.

History: En. Sec. 585, Pen. C. 1895; M. 1947; redes. 94-8-307 by Sec. 29, Ch. re-en. Sec. 8411, Rev. C. 1907; re-en. Sec. 513, L. 1973. Cal. Pen. C. Sec. 324. 11154, R. C. M. 1921; Sec. 94-3007, R. C.

**94-8-308. (11155) Property offered for disposal in lottery forfeited.** All moneys or property offered for sale or distribution in violation of any of the provisions of this chapter [part], are forfeited to the state, and may be recovered by information filed, or by an action brought by the attorney general, or by any county attorney in the name of the state. Upon the filing of the information or complaint, the clerk of the court, or, if the suit is in a justice's court, the justice, must issue an attachment against the property mentioned in the complaint or information, which attachment has the same force and effect against such property, and is issued in the same manner as attachments are issued from the district courts in civil cases.

History: En. Sec. 586, Pen. C. 1895; M. 1947; redes. 94-8-308 by Sec. 29, Ch. re-en. Sec. 8412, Rev. C. 1907; re-en. Sec. 513, L. 1973. Cal. Pen. C. Sec. 325. 11155, R. C. M. 1921; Sec. 94-3008, R. C.

**94-8-309. (11156) Letting building for lottery purposes.** Every person who lets or permits to be used, any building or vessel, or any portion thereof, knowing that it is to be used for setting up, managing, or drawing, any lottery, or for the purpose of selling or disposing of lottery tickets, is guilty of a misdemeanor.

History: En. Sec. 587, Pen. C. 1895; M. 1947; redes. 94-8-309 by Sec. 29, Ch. re-en. Sec. 8413, Rev. C. 1907; re-en. Sec. 513, L. 1973. Cal. Pen. C. Sec. 326. 11156, R. C. M. 1921; Sec. 94-3009, R. C.

**94-8-310. (11157) Lotteries out of this state.** The provisions of this chapter [part] are applicable to lotteries drawn or to be drawn out of this state, whether authorized or not by the laws of the state or country where they are drawn or to be drawn, in the same manner as to lotteries drawn or to be drawn within this state.

History: En. Sec. 588, Pen. C. 1895; M. 1947; redes. 94-8-310 by Sec. 29, Ch. re-en. Sec. 8414, Rev. C. 1907; re-en. Sec. 513, L. 1973. 11157, R. C. M. 1921; Sec. 94-3010, R. C.

**94-8-311. (11158) Punishment.** Every person convicted of any of the offenses mentioned in this chapter [part], is punishable by imprisonment in the county jail not exceeding one year, or by fine not exceeding two thousand dollars, or both.

History: En. Sec. 589, Pen. C. 1895; re-en. Sec. 8415, Rev. C. 1907; re-en. Sec. 11158, R. C. M. 1921; Sec. 94-3011, R. C. M. 1947; redes. 94-8-311 by Sec. 29, Ch. 513, L. 1973. lottery and banned by the criminal laws of this state. State v. Marck, 124 M 178, 220 P 2d 1017; State v. Read, 124 M 184, 220 P 2d 1020; State ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P 2d 1029.

#### Slot Machines

The operation of a slot machine is a

## Part Four

## Gambling

**94-8-401. (11159) Gambling prohibited—penalty.** Except as otherwise provided by law, a person who engages in gambling in any form with cards, dice, or other implements or devices of any kind wherein anything valuable may be wagered upon the outcome or who keeps any establishment, place, equipment, or apparatus for such gambling or any agents or employees for such purpose is guilty of a misdemeanor and is punishable by a fine of not less than \$100 or more than \$1,000 or imprisonment not less than 3 months or more than 1 year or by both such fine and imprisonment.

**History:** En. Sec. 600, Pen. C. 1895; amd. Sec. 1, p. 80, L. 1897; amd. Secs. 1, 2 and 3, pp. 166, 167, L. 1901; amd. Sec. 1, Ch. 115, L. 1907; re-en. Sec. 8416, Rev. C. 1907; amd. Sec. 1, Ch. 86, L. 1917; re-en. Sec. 11159, R. C. M. 1921; amd. Sec. 1, Ch. 153, L. 1937; Sec. 94-2401, R. C. M. 1947; redes. 94-8-401 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 19, Ch. 508, L. 1977; Cal. Pen. C. Sec. 330.

**Compiler's Note**

The provisos to this section, as they appeared prior to the 1977 amendment, were held unconstitutional in *State ex rel. Harrison v. Deniff* and in *State ex rel. Woodahl v. District Court*. See annotations on "Constitutionality" below.

**Amendments**

The 1977 amendment completely rewrote this section. For prior version, see 94-2401 in the parent volume.

**Constitutionality**

This act and sections 84-5701 and 84-5702 (since repealed) authorizing and licensing so-called trade stimulators violated section 2, article XIX of the 1889 constitution, which prohibited the legislature from authorizing lotteries. *State ex rel. Harrison v. Deniff*, 126 M 109, 245 P 2d 140.

Voters' approval of gambling option submitted with 1972 Constitution did not repeal previous laws against gambling or validate the 1937 amendment of this section previously held unconstitutional. *State ex rel. Woodahl v. District Court*, 511 P 2d 318.

**Amount of Stakes Immaterial**

This section makes no distinction as to the amount of the stakes involved; hence it is immaterial that the stakes were merely treats or cigars. *State v. Dumphy*, 57 M 229, 187 P 897.

**Disposal of Money Found in Slot Machines**

Although provisions for the seizure and

destruction of apparatus used for gaming do not authorize seizure of money contained in slot machines and not found by the officer seizing them until they were about to be destroyed by order of court, it does not follow, in an action for its conversion by the operator of the machines, that the taking was unlawful or that plaintiff was entitled to its return. *Dorrell v. Clark*, 90 M 585, 4 P 2d 712.

**Federal Travel Act**

Sale by out-of-state manufacturers of punch boards and pull tabs to distributors in Montana did not constitute facilitation of unlawful activity in violation of former Montana gambling laws within the meaning of the Federal Travel Act (18 U.S.C. § 1952). *United States v. Gibson Specialty Co.*, 507 F 2d 446.

**Football Parlay Card**

Where football parlay card fixed the point spread and the odds and gave the house the benefits of ties, it was an integral part of the game necessary in order to play it, and thus a "device" within the meaning of this section. *United States v. Thompson*, 409 F Supp 1044.

**Game of Skill as Gambling Device**

An innocent game involving the element of skill alone becomes a gambling device when players bet on the outcome. *State ex rel. Dussault v. Kilburn*, 111 M 400, 109 P 2d 1113.

**Pinball Machine**

A "pinball" machine, equipped with a sloping plane studded with pins and containing holes into which a small ball, catapulted by means of a spring, must fall to enable the player to win and which pays off in trade checks, is a gambling device under the provisions of this section, and while the evidence shows that by long practice a certain amount of skill may be developed, with the patronizing public it is purely a game of chance, and the building in which it is used was a nuisance under former section 94-1002. *State ex rel.*



Dussault v. Kilburn, 111 M 400, 109 P 2d 1113.

### Prosecution of Gambling Laws

Actions for violation of the gambling laws may be prosecuted under either this section and section 94-8-404 or under former section 94-1001 et seq., the abatement law, or under each and all of such sections. State ex rel. Replogle v. Joyland Club, 124 M 122, 220 P 2d 988, 1000.

### Slot Machines

A so-called mint vending machine which by the insertion of a nickel and pulling a lever will bring the operator a package of mint of the value of five cents, and which may or may not in addition bring to him trade checks good for five cents in trade (and which also may be operated by the insertion of a trade check, in which event trade checks but not mint may or may not be paid), is a gambling device; the machine appeals to the operator's propensities to gamble and lures him into continuing his play in the hope that he may gain an amount much greater than the amount risked. Marvin v. Sloan, 77 M 174, 250 P 443.

Information charging defendant with the operation of slot machines was not subject to demurrer as not charging an offense. State v. Israel, 124 M 152, 220 P 2d 1003.

There is nothing in this law that makes it lawful for any person or any religious,

fraternal or charitable organization, or any private home to run, conduct or keep any slot machine within the state of Montana. State v. Israel, 124 M 152, 220 P 2d 1003.

The operation of all slot machines is prohibited to all persons without exception. State ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P 2d 1029.

### Sufficiency of Charge

An information charging a violation of the antigambling law in the words of this section was sufficient, and it was not necessary to describe the game in detail, or set out the means by which it was carried on. State v. Ross, 38 M 319, 99 P 1056.

An information charging defendant with permitting a game of chance to be played upon his premises is not defective because of its failure to set forth the names of the persons permitted to play. State v. Radmilovich, 40 M 93, 105 P 91.

The particular name of a game of chance played with cards for money, checks, etc. need not be stated in the information. State v. Duncan, 40 M 531, 107 P 510.

The allegation that the defendant did carry on, conduct, and cause to be conducted the game described is sufficient to charge an offense without regard to the expression "as owner and proprietor thereof," which may be regarded as surplusage. State v. Tudor, 47 M 185, 131 P 632.

## DECISIONS UNDER FORMER LAW

### Construction

This section, designed to permit the playing of certain games for amusement and pastime and as business trade stimulators upon payment of a license, was not susceptible of a construction allowing use of trade checks for betting purposes in the games enumerated. State v. Aldahl, 106 M 390, 78 P 2d 935.

### Construction of Amendment

The 1937 amendment to this section which added the licensing provisions did not affect section 94-8-404. State ex rel. Replogle v. Joyland Club, 124 M 122, 220 P 2d 988.

### Redeemable Tokens

The operator of a cigar store and beer parlor who permitted the game of blackjack to be played therein with trade checks ranging in price from five cents to five dollars, sold by him to the players and which were redeemable, at the option of the holder, either in merchandise or cash, was properly found guilty of violat-

ing this section. State v. Aldahl, 106 M 390, 78 P 2d 935.

### Religious, Fraternal and Charitable Organizations

Religious, fraternal and charitable organizations and private homes are by section 94-8-403 exempt from the payment of license fees but are not exempt from the provisions of this act which existed prior to the 1937 amendment. State ex rel. Replogle v. Joyland Club, 124 M 122, 220 P 2d 988; State v. Israel, 124 M 152, 220 P 2d 1003.

### Slot Machines

Slot machines are not included among the enumerated "hickey" games nor among the "trade stimulators" from which the ban was lifted by the 1937 amendment known as the "Hickey Law." State v. Israel, 124 M 152, 220 P 2d 1003; State ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P 2d 1029.

This section, banning the possession of slot machines, was not repealed by sections



84-3601 to 84-3610 (since repealed). State v. Engle, 124 M 175, 220 P 2d 1015; State ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P 2d 1029.

The ban against slot machines was not

lifted by sections 84-5701 and 84-5702 (since repealed). State ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P 2d 1029.

### 94-8-402, 94-8-403. Repealed.

#### Repeal

Sections 94-8-402, 94-8-403 (Secs. 2, 3, Ch. 153, L. 1937), relating to gambling

licenses, were repealed by Sec. 27, Ch. 508, Laws 1977.

**94-8-404. (11160) Possession of gambling implements prohibited.** Any person who has in his possession or under his control or who permits to be placed, maintained, or kept in any room, space, inclosure, or building owned, leased, or occupied by him or under his management or control any faro box, faro layout, roulette wheel, roulette table, crap table, punchboard, or any machine or apparatus of the kind mentioned in 94-8-401 is punishable by a fine of not less than \$100 or more than \$1,000 and may be imprisoned for not less than 3 months or more than 1 year in the discretion of the court, provided that this section shall not apply to a public officer or to a person coming into possession thereof in or by reason of the performance of an official duty and holding the same to be disposed of according to law.

**History:** En. Sec. 2, Ch. 115, L. 1907; Sec. 8417, Rev. C. 1907; re-en. Sec. 11160, R. C. M. 1921; Sec. 94-2404, R. C. M. 1947; redes. 94-8-404 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 20, Ch. 508, L. 1977.

This section, banning the possession of slot machines, was not repealed by sections 84-3601 to 84-3610 (since repealed). State v. Engle, 124 M 175, 220 P 2d 1015; State ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P 2d 1029.

#### Amendments

The 1977 amendment substituted "punchboard, or any machine or apparatus of the kind mentioned in 94-8-401" in the middle of the section for "slot machine, or any machine or apparatus of the kind mentioned in the preceding section of this act"; and made minor changes in phraseology, punctuation and style.

#### Effect of Other Laws

This section was not affected by the 1937 amendment to section 94-8-401. State ex rel. Replogle v. Joyland Club, 124 M 122, 220 P 2d 988; State ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P 2d 1029.

#### Possession of Equipment

This section prohibits mere possession of gambling equipment and does not require intent to use it unlawfully; defendant who openly rebuilt and manufactured gambling devices for shipment to Nevada, where they were legal, was in violation of this section. State v. Wilson, 160 M 473, 503 P 2d 522.

#### Prosecution of Gambling Laws

Actions for violation of the gambling laws may be prosecuted under either this section and section 94-8-401 or as a nuisance under the abatement law. State ex rel. Replogle v. Joyland Club, 124 M 122, 220 P 2d 988.

**94-8-405. (11161) Obtaining money by means of gambling games or tricks considered theft.** Every person who, by means of any game, device, sleight-of-hand trick, or other means whatever, by the use of cards or other implements other than those mentioned in 94-8-406, or while betting on sides or hands of any such game or play, fraudulently obtains from another person money or property of any description is guilty of theft of property of like value.

**History:** En. Sec. 3, Ch. 115, L. 1907; Sec. 8418, Rev. C. 1907; re-en. Sec. 11161, R. C. M. 1921; Sec. 94-2405, R. C. M. 1947; redes. 94-8-405 by Sec. 29, Ch. 513, L.

1973; amd. Sec. 70, Ch. 359, L. 1977; Cal. Pen. C. Sec. 332.

#### Amendments

The 1977 amendment substituted "theft"

near the end of the section for "larceny"; and made minor changes in phraseology and punctuation.

**94-8-406. (11162) Brace and bunco games prohibited.** Every person who uses or deals with or wins any money or property by the use of brace faro, or of any two-card faro box, or any brace roulette wheel or roulette table, or any brace apparatus, or with loaded dice or with marked cards, or by any game commonly known as a confidence game or bunco, is punishable by imprisonment in the state prison not exceeding five years.

**History:** En. Sec. 4, Ch. 115, L. 1907; Sec. 8419, Rev. C. 1907; re-en. Sec. 11162, R. C. M. 1921; Sec. 94-2406, R. C. M. 1947; redcs. 94-8-406 by Sec. 29, Ch. 513, L. 1973.

and bunco game, to win money from his victim was properly convicted of the crime prohibited by this section. *State v. Hale*, 134 M 131, 328 P 2d 930.

#### Confidence or Bunco Game

Any game which is by this statute outlawed may be a confidence or bunco game, for the design and conduct of those who use it gives it its character under this statute. *State v. Hale*, 134 M 131, 328 P 2d 930.

#### Penalty

The penalty of violating this statute is imposed upon every person who uses or deals with any game commonly known as a confidence game or bunco, as well as one who wins. *State v. Hale*, 134 M 131, 328 P 2d 930.

#### Gambling Devices

The games described in this section are purported gambling devices so contrived, although masked as legitimate operations, as to bilk the victim of his wager by manipulation. These games do not depend upon the active or passive emotions of the victim. *State v. Hale*, 134 M 131, 328 P 2d 930.

#### Purpose of Statute

This statute is aimed at the person who uses or deals with a confidence game, or bunco game, and not so much against the inanimate paraphernalia so used. *State v. Hale*, 134 M 131, 328 P 2d 930.

#### Separate and Distinct Crime

This statute covers a separate and distinct crime from that covered by former section 94-1806. *State v. Hale*, 134 M 131, 328 P 2d 930.

#### Morocco

Defendant who used and dealt with game of "Morocco," a confidence game

**94-8-407. (11163) Soliciting or persuading persons to visit gambling resorts prohibited.** Any person who persuades or solicits another to visit any room, tent, apartment or place used, or represented by the person soliciting or persuading to be a place used for the purpose of running any of the games prohibited by this act, shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or imprisonment not less than three months nor more than one year, or by both such fine and imprisonment in the county jail.

**History:** En. Sec. 5, Ch. 115, L. 1907; Sec. 8420, Rev. C. 1907; re-en. Sec. 11163, R. C. M. 1921; Sec. 94-2407, R. C. M. 1947;

redcs. 94-8-407 by Sec. 29, Ch. 513, L. 1973. Cal. Pen. C. Sec. 318.

**94-8-408. (11164) Penalty for second offense.** Every person who, having been convicted of a violation of any of the provisions of this act, which is punishable by fine, commits another such violation after such conviction, is punishable by a fine of not less than five hundred nor more than one thousand dollars, and by imprisonment in the county jail for not less than six months nor more than one year.

**History:** En. Sec. 6, Ch. 115, L. 1907; Sec. 8421, Rev. C. 1907; re-en. Sec. 11164,

R. C. M. 1921; Sec. 94-2408, R. C. M. 1947; redcs. 94-8-408 by Sec. 29, Ch. 513, L. 1973.



**94-8-409. (11165) Maintaining gambling apparatus a nuisance.** Any article, machine or apparatus maintained or kept in violation of any of the provisions of this act is a public nuisance, but the punishment for the maintaining or keeping of the same shall be as provided in this act.

**History:** En. Sec. 7, Ch. 115, L. 1907; re-en. Sec. 8422, Rev. C. 1907; re-en. Sec. 11165, R. C. M. 1921; Sec. 94-2409, R. C. M. 1947; redes. 94-8-409 by Sec. 29, Ch. 513, L. 1973.

#### Nuisances

Any article, machine or apparatus maintained or kept in violation of any of the provisions of sections 94-8-401 or 94-8-404 is a public nuisance. State ex rel. Olsen

v. Crown Cigar Store, 124 M 310, 220 P 2d 1029.

#### Slot Machines

The using, operating, keeping, and maintaining for use, of slot machines constitutes a nuisance. State ex rel. Replogle v. Joyland Club, 124 M 122, 220 P 2d 988; State v. Israel, 124 M 152, 220 P 2d 1003; State ex rel. Brown v. Buffalo Rapids Club, 124 M 172, 220 P 2d 1014.

**94-8-410. (11166) Duty of public officer to seize gambling implements and apparatus.** It shall be the duty of every officer authorized to make arrests, to seize every machine, apparatus, or instrument answering to the description contained in this act, or which may be used for the carrying on or conducting of any game or games mentioned in this act, and to arrest the person actually or apparently in possession or control thereof, or of the premises in which the same may be found, if any such person be present at the time of the seizure and to bring the machine, apparatus, or instrument and the prisoner, if there be one, before a committing magistrate.

**History:** En. Sec. 8, Ch. 115, L. 1907; Sec. 8423, Rev. C. 1907; re-en. Sec. 11166, R. C. M. 1921; Sec. 94-2410, R. C. M. 1947; redes. 94-8-410 by Sec. 29, Ch. 513, L. 1973.

#### Destruction of Machines

Decree requiring sheriff to sell seized slot machines was amended on appeal to require the sheriff to destroy them. State ex rel. Replogle v. Joyland Club, 124 M 122, 220 P 2d 988.

**94-8-411. (11167) Duty of magistrate to retain gambling implement or apparatus for trial.** The magistrate before whom any machine, apparatus, or instrument is brought pursuant to 94-8-410 must, if there is a prisoner and if he holds such prisoner, cause the machine, apparatus, or instrument to be delivered to the county attorney to be used as evidence on the trial of such prisoner. If there is no prisoner or if the magistrate does not hold the prisoner, the magistrate must cause the immediate and public destruction of the machine, apparatus, or instrument in his own presence. No person owning or claiming to own any such machine, apparatus, or instrument so destroyed has any right of action against any person or against the state, county, or city for the value of such article or for damages. It is the duty of the county attorney to produce such articles in court on the trial of the case. It is the duty of the trial court, after the disposition of the case and whether the defendant is convicted, acquitted, or fails to appear for trial, to cause the immediate and public destruction of any such article by the sheriff or any other officer or person designated by the court.

**History:** En. Sec. 9, Ch. 115, L. 1907; Sec. 8424, Rev. C. 1907; re-en. Sec. 11167, R. C. M. 1921; Sec. 94-2411, R. C. M. 1947; redes. 94-8-411 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 21, Ch. 508, L. 1977.

#### Amendments

The 1977 amendment substituted "94-8-410" in the middle of the first sentence for "the preceding section"; and made minor changes in phraseology and punctuation.



**Return of Machines Erroneous**

It was error for district court to order slot machines and other gambling equipment returned to defendant on an ex parte

proceeding before the disposition of the case and the order was void ab initio. *State v. Israel*, 124 M 152, 220 P 2d 1003.

**94-8-412. (11167.1) Disposal of moneys confiscated by reason of violation of gambling laws.** All moneys seized or taken by any peace officer and confiscated by order of any court, by reason of a violation of the gambling laws of the state of Montana, shall be deposited with the county treasurer of the county in which such seizure and confiscation was made, and shall be credited to the poor fund of the county.

History: En. Sec. 1, Ch. 25, L. 1933; Sec. 94-2412, R. C. M. 1947; redes. 94-8-412 by Sec. 29, Ch. 513, L. 1973.

**94-8-413. (11168) Repealed.****Repeal**

Section 94-8-413 (Sec. 10, Ch. 115, L. 1907), relating to peace officers entering

places where gambling is conducted, was repealed by Sec. 27, Ch. 508, Laws 1977.

**94-8-414. (11169) Duty of public officer to make complaint.** Every county attorney, sheriff, constable, chief of police, marshal, or police officer must inform against and make complaint and diligently prosecute persons whom they know, or concerning whom they may be informed, or whom they may have reasonable cause to believe to be offenders against the provisions of this act. The neglect or refusal of any such officer to make complaint against or diligently prosecute persons he has reasonable cause to believe to be offenders against the provisions of this act shall be deemed sufficient cause for removal from office.

History: En. Sec. 11, Ch. 115, L. 1907; Sec. 8426, Rev. C. 1907; re-en. Sec. 11169, R. C. M. 1921; Sec. 94-2414, R. C. M. 1947; redes. 94-8-414 by Sec. 29, Ch. 513, L. 1973.

**Failure to Diligently Prosecute**

Where county attorney moved to dismiss for lack of evidence charges against four persons accused of cheating at cards

and the district court granted the motion, the stamp of judicial approval overcame the presumption otherwise arising under this section that failure to prosecute constituted sufficient grounds for removal of the county attorney from office, and the district judge erred in ordering his removal. *State ex rel. Forsythe v. Coate*, — M —, 552 P 2d 60.

**94-8-415. (11170) Duty of mayors to enforce law.** It shall be the duty of every mayor of every town or city in this state to cause this act to be diligently enforced and to cause the police officers of his city or town to arrest and to make complaint against any and all persons whom he or they know, or have reasonable cause to believe to be offenders against any of the provisions of this act.

History: En. Sec. 12, Ch. 115, L. 1907; Sec. 8427, Rev. C. 1907; re-en. Sec. 11170, R. C. M. 1921; Sec. 94-2415, R. C. M. 1947, redes. 94-8-415 by Sec. 29, Ch. 513, L. 1973.

**94-8-416. (11171) Officers neglecting duty subject to forfeiture of office.** Every county attorney, sheriff, mayor, constable, chief of police, marshal, or police officer who shall refuse or neglect to perform any of the duties imposed upon him by any of the provisions of this act, shall be guilty

of a misdemeanor and be punishable by a fine of not less than one hundred nor more than three thousand dollars, or imprisonment for not less than six months nor more than one year in the county jail. A conviction under this section shall, unless set aside, also work a forfeiture of the office of such officer and operate as a removal from office. But a prosecution under this section shall not bar or interfere with any proceeding or action for removal from office which may be brought under any other provision of law or statute, nor affect or limit the effect or operation of any other statute regarding removals or suspensions from office.

History: En. Sec. 13, Ch. 115, L. 1907; R. C. M. 1921; Sec. 94-2416, R. C. M. 1947; Sec. 8428, Rev. C. 1907; re-en. Sec. 11171, redes. 94-8-416 by Sec. 29, Ch. 513, L. 1973.

**94-8-417. (11172) Receiving money to protect offenders prohibited.**

Every state, county, city, or township officer, or other person, who shall ask for, receive, or collect any money or valuable consideration, either for his own or for the public use, or the use of any other person or persons, for and with the understanding that he will protect or exempt any person from arrest or conviction for any violation of the provisions of this act, or that he will abstain from arresting or prosecuting, or causing to be arrested or prosecuted, any person offending against any of the provisions of this act, or that he will permit any of the things prohibited by this act to be done or carried on, and every such state, county, city, or township officer who shall grant, issue, or deliver, or cause to be issued or delivered to any person or persons, any license, permit, or other privilege giving or pretending to give any authority or right to any person or persons to carry on, conduct, open, or cause to be conducted or opened or carried on, any game or games which are forbidden by any of the provisions of this act, is guilty of a felony.

History: En. Sec. 14, Ch. 115, L. 1907; redes. 94-8-417 by Sec. 29, Ch. 513, L. Sec. 8429, Rev. C. 1907; re-en. Sec. 11172, 1973. Cal. Pen. C. Sec. 337. R. C. M. 1921; Sec. 94-2417, R. C. M. 1947;

**94-8-418. (11173) Losses at gambling may be recovered in civil action.**

If any person, by playing or betting at any of the games prohibited by this act, loses to another person any sum of money, or thing of value, and pays or delivers the same, or any part thereof, to any person connected with the operating or conducting of such game, either as owner, or dealer, or operator, the person who so loses and pays or delivers may, at any time within sixty days next after the said loss and payment or delivery, sue for and recover the money or thing of value so lost and paid or delivered, or any part thereof from any person having any interest, direct or contingent, in the game, as owner, backer, or otherwise, with costs of suit, by civil action before any court of competent jurisdiction, together with exemplary damages, which in no case shall be less than fifty nor more than five hundred dollars, and may join as defendants in said suit, all persons having any interest, direct or contingent, in such game as backers, owners, or otherwise.

History: En. Sec. 15, Ch. 115, L. 1907; Sec. 8430, Rev. C. 1907; re-en. Sec. 11173, R. C. M. 1921; Sec. 94-2418, R. C. M. 1947; redes. 94-8-418 by Sec. 29, Ch. 513, L. 1973.

**Constitutionality**

The antigambling law was not rendered invalid by the insertion of this section. The right to exemplary damages thus given is in the nature of a penalty and constitutes a part of the penalty provided by



the act. *State v. Ross*, 38 M 319, 99 P 1056.

#### **Racing Entry Fee**

A complaint in an action to recover the amount of two dollars lost by plaintiff as an alleged bet on a horse race, with exemplary damages, under this section, alleging in substance that defendant fair association had given notice that it would conduct horse racing for purses, at which any owner or co-owner of a horse competing in the races would be required to pay an entrance fee of two dollars and that no person other than such owner or

co-owners would be permitted to pay an entrance fee; that plaintiff, representing himself to be a co-owner of a certain horse, paid the required fee; that the horse did not win; that the purse plus an amount equal to the entrance fees for that horse was paid to the owners of the winning horse; that the purse was made up of funds belonging to the association and that the association did not have any interest in the outcome of the race, etc., did not state a cause of action and demurrer thereto was properly sustained. *Toomey v. Penwell*, 76 M 166, 245 P 943.

#### **94-8-419. (11174) Action may be brought by any dependent person.**

If any person losing such money or thing of value does not, within sixty days, without collusion or deceit, sue and with effect prosecute for the money or thing of value so lost and paid or delivered, any person, or a guardian of any person, dependent in any degree for support upon or entitled to the earnings of such persons losing said money or thing of value, or any citizen for the use of the person so dependent, may, within one year, sue for and recover the same, with costs of suit and exemplary damages as aforesaid, against any and all persons having any interest, direct or contingent, in the said game as backers, owners, or otherwise, as aforesaid.

**History:** En. Sec. 16, Ch. 115, L. 1907; redes. 94-8-419 by Sec. 29, Ch. 513, L. Sec. 8431, Rev. C. 1907; re-en. Sec. 11174, 1973.  
R. C. M. 1921; Sec. 94-2419, R. C. M. 1947;

**94-8-420. (11175) Pleadings in actions to recover moneys lost.** In the prosecutions of such actions it shall be sufficient for the complaint to allege that the defendant is indebted to the plaintiff's use, the money or thing of value so lost and paid or delivered, whereby the plaintiff's action accrued to him, or to the person for whose use the suit is brought, without setting forth the special matter. In case suit is brought by a plaintiff for the use of another person, that fact and the name of the person for whose use the suit is brought shall be stated.

**History:** En. Sec. 17, Ch. 115, L. 1907; redes. 94-8-420 by Sec. 29, Ch. 513, L. Sec. 8432, Rev. C. 1907; re-en. Sec. 11175, 1973.  
R. C. M. 1921; Sec. 94-2420, R. C. M. 1947;

**94-8-421. (11176) Compelling testimony in such actions.** Every person liable in a civil action under this act may be compelled to answer, upon oath, interrogatories annexed to the complaint in such civil action for the purpose of discovery of his liability; and upon discovery and repayment of the money or other thing, the person discovering and repaying the same, with costs and such an amount of exemplary damages as may be agreed upon by the parties, or fixed by the court, shall be acquitted and discharged from any further or other forfeiture, punishment, penalty, or prosecution he or they may have incurred for so winning such money or thing, discovered and repaid.

**History:** En. Sec. 18, Ch. 115, L. 1907; redes. 94-8-421 by Sec. 29, Ch. 513, L. Sec. 8433, Rev. C. 1907; re-en. Sec. 11176, 1973.  
R. C. M. 1921; Sec. 94-2421, R. C. M. 1947;



**94-8-422. (11177) Lessor of buildings used for gambling purposes treated as principal.** Whenever premises are occupied for the doing of any of the things or running any of the games prohibited by this part, the lease or agreement under which they are so occupied shall be absolutely void at the instance of the lessor, who may at any time obtain possession by civil action or by action of unlawful detainer. If any person leases premises for any such purpose or knowingly permits them to be used or occupied for such purpose or purposes or, knowing them to be so occupied or used, fails immediately to prosecute in good faith an action or proceeding for the recovery of the premises, such lessor shall be considered in all cases, civil and criminal, as a principal in running the games or doing the things run or done in such building in violation of this part and shall be dealt with and punished accordingly.

**History:** En. Sec. 19, Ch. 115, L. 1907; Sec. 8434, Rev. C. 1907; re-en. Sec. 11177, R. C. M. 1921; Sec. 94-2422, R. C. M. 1947; redes. 94-8-422 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 22, Ch. 508, L. 1977.

#### Amendments

The 1977 amendment substituted "this part" for "this act" in two places; substituted "unlawful detainer" for "forcible detainer" at the end of the first sentence; and made minor changes in phraseology and punctuation.

**94-8-423. (11178) Immunity of witnesses.** No person shall be excused from attending or testifying or producing any books, papers, documents, or any thing or things, before any court or magistrate upon any investigation, proceeding or trial for a violation of any of the provisions of this act, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to convict him of a crime, or to subject him to a penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence of, documentary or otherwise; and no testimony or evidence so given or produced shall be received against him in any civil or criminal proceeding, action, or investigation.

**History:** En. Sec. 20, Ch. 115, L. 1907; Sec. 8435, Rev. C. 1907; re-en. Sec. 11178, R. C. M. 1921; Sec. 94-2423, R. C. M. 1947; redes. 94-8-423 by Sec. 29, Ch. 513, L. 1973.

#### Failure to Claim Immunity

Even though it be assumed that this section is broad enough to include testimony before a grand jury it would have no application where defendant failed to claim either privilege or immunity when called before the grand jury. *State v. Saginaw*, 124 M 225, 220 P 2d 1021, distinguished in 130 M 299, 300 P 2d 952.

#### Grand Jury Testimony

The words "grand jury" should not be read into the phrase "court or magistrate." *State v. Saginaw*, 124 M 225, 220 P 2d 1021.

Defendant cannot, because of testimony before grand jury, be immune from prosecution for offense charged in information filed by county attorney weeks before impanelment of a grand jury. *State v. Saginaw*, 124 M 225, 220 P 2d 1021; *State v. McRae*, 124 M 238, 220 P 2d 1025, distinguished in 130 M 299, 300 P 2d 952.

**94-8-424. (11179) Ordinances concerning gambling.** No ordinance regarding gambling or gambling houses may be passed by any city, town, county, or other political subdivision of the state except in compliance with 62-701 through 62-736.

**History:** En. Sec. 21, Ch. 115, L. 1907; Sec. 8436, Rev. C. 1907; re-en. Sec. 11179, R. C. M. 1921; Sec. 94-2424, R. C. M. 1947;

redes. 94-8-424 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 23, Ch. 508, L. 1977.

#### Amendments

The 1977 amendment rewrote the section which read: "Upon the passage of this act, all ordinances and parts of ordinances of cities and towns in this state

regarding gambling and gambling houses shall be inoperative and void, and thereafter no ordinance regarding gambling or gambling houses shall be passed by any city or town."

#### 94-8-425 to 94-8-427. (11181-11183) Repealed.

##### Repeal

Sections 94-8-425 to 94-8-427 (Secs. 3, 4, Ch. 20, L. 1909; Secs. 3, 4, Ch. 92, L. 1909; Secs. 2, 3, 5, Ch. 55, L. 1915), relating to

aiding gambling, punishment of gambling, and effective date of the provisions, were repealed by Sec. 27, Ch. 508, Laws 1977.

**94-8-428. Slot machines—possession unlawful.** From and after the passage and approval of this act, it shall be a misdemeanor and punishable, as hereinafter provided, for any person to use, possess, operate, keep or maintain for use or operation or otherwise, anywhere within the state of Montana, any slot machine of any sort or kind whatsoever.

**History:** En. Sec. 1, Ch. 197, L. 1949; Sec. 94-2429, R. C. M. 1947; redes. 94-8-428 by Sec. 29, Ch. 513, L. 1973.

**94-8-429. Slot machine defined.** A slot machine is defined as a machine operated by inserting a coin, token, chip, trade check, or paper currency therein by the player and from the play of which he obtains or may obtain money, checks, chips, tokens, or paper currency redeemable in money. Merchandise vending machines where the element of chance does not enter into their operation are not within the provisions of this part.

**History:** En. Sec. 2, Ch. 197, L. 1949; Sec. 94-2429, R. C. M. 1947; redes. 94-8-429 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 24, Ch. 508, L. 1977.

currency" in two places in the first sentence; substituted "this part" for "this act" at the end of the section; and made minor changes in phraseology and punctuation.

#### Amendments

The 1977 amendment inserted "or paper

**94-8-430. Person or persons defined.** In addition to their ordinary meaning, the word "person" or "persons", as used in this part, includes both natural and artificial persons and all partnerships, corporations, associations, clubs, fraternal orders, and societies, including religious, fraternal, and charitable organizations.

**History:** En. Sec. 3, Ch. 197, L. 1949; Sec. 94-2431, R. C. M. 1947; redes. 94-8-430 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 25, Ch. 508, L. 1977.

#### Amendments

The 1977 amendment substituted "this part" for "this act" in the middle of the section; and made minor changes in phraseology and punctuation.

**94-8-431. Penalty for possession or permitting use of slot machine.** Any person, partnership, club, society, fraternal order, corporation, cooperative association or any other person, individual, or organization who violates any of the provisions of this act or who permits the use of any slot machine, as herein defined, on any place or premises owned, occupied, or controlled by him or it is guilty of a misdemeanor and is punishable by a fine of not less than \$100 or more than \$1,000 or by imprisonment in the county jail for not



less than 3 months or more than 1 year or by both such fine and imprisonment.

**History:** En. Sec. 4, Ch. 197, L. 1949; Sec. 94-2432, R. C. M. 1947; redes. 94-8-431 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 26, Ch. 508, L. 1977.

#### Amendments

The 1977 amendment increased the maximum fine from \$500 to \$1,000; increased the jail term from 30 days to 6 months to 3 months to 1 year; and made minor changes in phraseology and punctuation.

#### Separability of Provisions

Section 6 of Ch. 197, Laws 1949 read "If any part of this act shall be declared by any court of competent jurisdiction to be unconstitutional, such unconstitutionality shall not affect the validity of the remaining parts of this act."

#### Repealing Clauses

Section 32 of Ch. 513, Laws 1973 read "Sections 94-101 through 94-103, 94-105 through 94-119, 94-201 through 94-206, 94-301 through 94-306, 94-501 through 94-506, 94-601 through 94-605, 94-701 through 94-705, 94-801 through 94-807, 94-809 through 94-811, 94-901 through 94-909, 94-1001 through 94-1011, 94-1101 through 94-1103, 94-1106, 94-1201 through 94-1209, 94-1301 through 94-1307, 94-1501 through 94-1519, 94-1601 through 94-1617, 94-1701 through 94-1707, 94-1801 through 94-1831, 94-1901 through 94-1904, 94-2001 through 94-2014, 94-2101 through 94-2104, 94-2202, 94-2301 through 94-2321, 94-2501 through 94-2515, 94-2601 through 94-2604, 94-2701 through 94-2726, 94-2801 through 94-2811, 94-2901 through 94-2919, 94-3109, 94-3111, 94-3202 through 94-3208, 94-3210, 94-3211, 94-3301 through 94-3344, 94-3401, 94-3402, 94-3501 through 94-3512, 94-3514 through 94-3521, 94-3523, 94-3524, 94-3528, 94-3533 through 94-3549, 94-3551 through 94-3554, 94-3556 through 94-3566, 94-3570 through 94-3572, 94-3574 through 94-3577, 94-3581 through 94-35-101, 94-35-104 through 94-35-108, 94-35-110 through 94-35-122, 94-35-124 through 94-35-134, 94-35-137 through 94-35-147, 94-35-149 through 94-35-151, 94-35-163 through 94-35-171, 94-35-175, 94-35-177 through 94-35-183, 94-35-187 through 94-35-198, 94-35-201, 94-35-202, 94-35-208 through 94-35-265, 94-35-269, 94-35-272, 94-35-274, 94-35-275, 94-3601 through 94-3619, 94-3701 through 94-3704, 94-3801 through 94-3813, 94-3901 through 94-3920, 94-4001 through 94-4005,

94-4101 through 94-4120, 94-4201 through 94-4208, 94-4301 through 94-4303, 94-4401 through 94-4427, 94-4501, 94-4502, 94-4601 through 94-4607, 94-4701 through 94-4715, 94-4718 through 94-4725, 94-4801, 94-4802, 94-4804, 94-4806, 94-4808, 94-4809, 94-5001 through 94-5005, 94-5101 through 94-5116, 94-5201, 94-5202, 94-5301 through 94-5314, 94-5501 through 94-5516, 94-5701 through 94-5706, 94-6414 through 94-6421, 94-6423 through 94-6425, 94-6429, 94-6808.1 through 94-6808.5, 94-7208, 94-7211 through 94-7220, 94-7240, 94-7307, 94-8508 through 94-8510, 94-8803, 94-8804, 94-9001, 94-9005 through 94-9007, 94-9201 through 94-9214, 94-9307, 94-9901 through 94-9908, 94-401-1 through 94-401-3, 94-501-1 through 94-501-32, 94-801-1, 94-801-2, 94-1001-1 through 94-1001-11, 95-2006, 95-2206 R. C. M. 1947, and all acts and parts of acts in conflict herewith are repealed."

Section 27 of Ch. 508, Laws 1977 read "Sections 84-5703 through 84-5719, 94-8-402, 94-8-403, 94-8-413, 94-8-425, 94-8-426, and 94-8-427, R. C. M. 1947, are repealed."

#### Effective Date

Section 33 of Ch. 513, Laws 1973 read "The Montana Criminal Code and all other provisions of this act are effective January 1, 1974, and shall apply to all offenses alleged to have been committed on or after that date. The Montana Criminal Code and all other provisions of this act do not apply to offenses committed prior to its effective date and prosecutions for such offenses shall be governed by the prior law, which is continued in effect for that purpose, as if this act were not in force. For the purposes of this section, an offense was committed prior to the effective date of this act if any of the elements of the offense occurred prior thereto."

#### Separability Clause

Section 34 of Ch. 513, Laws 1973 read "It is the intent of the legislative assembly that if a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications."



# **CROSS REFERENCE TABLE—MONTANA CRIMINAL CODE OF 1973**

Showing the location in the Criminal Code of 1973 (or other titles) of provisions similar to those contained in the original Title 94, Revised Codes of Montana, 1947

R.C.M., 1947 Title 94 Old Section	Subject Matter	Montana Criminal Code of 1973	Subject Matter
101	Construction of penal statutes	94-1-102(2)	General purposes and principles of construction
102	Provisions similar to existing law how construed	None	
103	Effect of code upon past offenses	94-1-103	Application to offenses committed before and after enactment
104	Repealed in 1947		
105	What intent to defraud is sufficient	94-2-101(52)	Definition of "purposely"
106	Civil remedies preserved	94-1-104(1)	Civil liability and remedies preserved
107	Proceedings to impeach or remove officers and others preserved	94-7-401(5)	Official misconduct
108	Authority of court-martial preserved—courts of justice to punish for contempt	94-1-104(2)	Contempt power preserved
109	Sections declaring crimes punishable — duty of court	95-2212 95-2206	Sentence to be imposed by judge Sentence
110	Punishments, how determined	None	
111	Witness' testimony may be read against him on prosecution for perjury	95-1807	Immunity of witnesses
112	Crime and public offense defined	94-2-101(15), (30) and (36)	Definitions of "felony," "misdemeanor" and "offense"
113	Crimes, how divided	94-2-101(15) and (30)	Definitions of "felony" and "misdemeanor"
114	Felony and misdemeanor defined	94-2-101(15) and (30)	Definitions of "felony" and "misdemeanor"
115	Punishment of felony, when not otherwise prescribed	95-2206 95-2206.4  94-1-105	Sentence When no felony penalty is specified Classification of offense
116	Punishment of misdemeanor, when not otherwise prescribed	95-2206.3	When no penalty is specified
117	To constitute crime there must be unity of act and intent	94-2-102 94-2-103  94-2-101 94-2-105	Voluntary acts General requirements of culpability General definitions Causal relationships between conduct and result

CRIMINAL CODE OF 1973

R.C.M., 1947 Title 94 Old Section	Subject Matter	Montana Criminal Code of 1973	Subject Matter
118	Intent, how manifested and who considered of sound mind	94-2-102 94-2-103  94-2-101 94-2-104 95-501 to 95-509	Voluntary acts General requirements of culpability General definitions Absolute liability Competency of the accused
119	Drunkenness no excuse for crime—when it may be considered—how in- sanity must be proven	94-2-109  95-501 to 95-509	Responsibility of intoxicated person Competency of the accused
201	Who are capable of com- mitting crimes	94-2-109  94-2-102 94-3-110 95-501 to 95-509	Responsibility of intoxicated person Voluntary acts Compulsion Competency of the accused
202	Who are liable to punish- ment	95-304	State criminal jurisdiction
203	Classification of parties to crime	94-2-106  94-2-107	Accountability for conduct of another When accountability exists
204	Who are principals	94-4-101 94-2-106	Solicitation Accountability
205	Who are accessories	94-7-303	Obstructing justice
206	Punishment of accessories	94-7-303 94-2-108	Obstructing justice Separate conviction of per- sons accountable
301	Penalty for abandonment or failure to support wife	94-5-608	Nonsupport
302	Orders which may be en- tered by the court	94-5-608(4) 95-2216(c)	Fine or forfeiture of bond Earnings of prisoners
303	Certain proof made prima facie evidence	94-5-607(3)	Evidence of violation of duty
304	Desertion or abandon- ment of child or ward a felony—suspension of sentence, when	94-5-607 94-5-608	Endangering the welfare of children Nonsupport
305	Disposing of child for mendicant business	None	
306	Cruelty to children	94-5-607  10-901 to 10-905	Endangering the welfare of children Reports of child neglect or abuse
401	Administering drugs, etc., with intent to produce miscarriage	94-5-611	Repealed
402	Submitting to an attempt to produce miscarriage	94-5-612	Repealed
501	Purpose of act—short title	None	
502	Arson — first degree — burning of dwellings	94-6-104	Arson
503	Arson — second degree —burning of buildings, etc., other than dwell- ings	94-6-103 94-6-102	Negligent arson Criminal mischief

## CROSS REFERENCE TABLE

R.C.M., 1947 Title 94 Old Section	Subject Matter	Montana Criminal Code of 1973	Subject Matter
504	Arson—third degree— burning of other prop- erty	94-6-102	Criminal mischief
505	Arson—fourth degree— attempt to burn build- ings or property	94-4-103 94-4-101	Attempts Solicitation
506	Burning to defraud in- surer	94-6-102(c)	Criminal mischief
601	Assault in first degree	94-5-202	Aggravated assault
602	Assault in second de- gree	94-5-201 94-5-202	Assault Aggravated assault
603	Assault in third degree	94-5-201	Assault
604	Assaults with caustic chemicals, etc.	94-5-202	Aggravated assault
605	Use of force not unlawful	94-3-102 94-3-103 94-3-104 94-3-105 94-3-106 94-3-107 95-602(b)	Use of force in defense of person Use of force in defense of occupied structure Use of force in defense of other property Use of force by aggressor Use of force to prevent es- cape Use of force by parent Method of arrest
701	Bigamy defined	94-5-604	Bigamy
702	Exceptions	94-5-604(1)(c)	Invalid judgment of divorce or annulment
703	Punishment for bigamy	94-5-604(2)	Punishment for bigamy
704	Marrying a husband or wife of another	94-5-605	Marrying a bigamist
705	Incest	94-5-606	Incest
801	Giving bribes to judges, jurors, referees, etc.	94-7-102	Bribery in official and politi- cal matters
802	Receiving bribes by ju- dicial officers, jurors, etc.	94-7-102	Bribery in official and politi- cal matters
803	Extortion	94-7-102(c)	Bribery in official and politi- cal matters
804	Improper attempts to in- fluence jurors, referees, etc.	94-7-102 94-7-103	Bribery in official and politi- cal matters Threats and other improper influence in official and political matters
805	Misconduct of jurors, ref- erees, etc.	94-4-103 94-4-101 94-7-103 94-7-401(1)(a)	Attempt Solicitation Threats and other improper influence in official and political matters Official misconduct
806	Embracery	94-7-102 94-7-103	Bribery in official and politi- cal matters Threats and other improper influence in official and political matters



# CRIMINAL CODE OF 1973

R.C.M., 1947 Title 94 Old Section	Subject Matter	Montana Criminal Code of 1973	Subject Matter
807	Misconduct of officers having charge of jury	94-7-103(e)	Threats and other improper influence in official and political matters
		94-7-401	Official misconduct
808	Justice or constable pur- chasing judgment	16-3607	No change in text
809	Convicted officer to for- feit and be disqualified from holding office	94-7-401(4)	Official misconduct
810	Bribery of school trustees	94-7-102	Bribery in official and politi- cal matters
811	Offender a competent wit- ness	95-1807	Immunity from prosecution
901 to 903	Burglary	94-6-204	Burglary
904	Word "enter" defined	94-6-201	Definition of terms
905	Nighttime defined	None	
906, 907	Burglary with explosives	94-6-204	Burglary
908	Possession of burglarious instruments	94-6-205	Possession of burglary tools
909	Carrying a deadly weap- on	94-5-202 94-4-103	Aggravated assault Attempt
1001 to 1011	Common nuisance — al- cohol, opium, prostitu- tion, and gambling	94-8-107	Public nuisances
1101	Criminal conspiracy	94-4-102	Conspiracy
1102	No other conspiracies punishable criminally	None	
1103	Overt act, when necessary	94-4-102(1)	Conspiracy
1104	Unlawful trusts and mo- nopolies	51-401	No change in text
1105	Certain agreements be- tween laborers ex- pected	51-402	No change in text
1106	Persons not to be excused from testifying	95-1807	Immunity from prosecution
1107 and 1108	Discrimination in pur- chase price of commod- ities	51-403 and 51-404	No change in text
1109	Penalty for discrimina- tion in purchases	51-405	Minor changes in text
1110 to 1112	Cumulative remedies, dis- crimination in sales	51-406 to 51-408	No change in text
1113	Penalty for discrimina- tion in sales	51-409	Minor changes in text
1114 to 1118	Cumulative remedies, pooling by warehouse- men, destruction of food	51-410 to 51-414	No change in text
1201	Overdriving animals	94-8-106(1)(a)	Cruelty to animals
1202	Abandonment of disabled animals	94-8-106(1)(c)	Cruelty to animals
1203	Failure to provide proper food and drink to im- pounded animals	94-8-106(1)(b)	Cruelty to animals

# CROSS REFERENCE TABLE

R.C.M., 1947 Title 94 Old Section	Subject Matter	Montana Criminal Code of 1973	Subject Matter
1204	Carrying an animal in a cruel manner	94-6-102 94-8-106	Criminal mischief Cruelty to animals
1205	Poisoning animals	94-6-102	Criminal mischief
1206	Keeping cows in un- healthy places	94-8-106	Cruelty to animals
1207	Promoting fights between animals	94-8-106	Cruelty to animals
1208	Killing, maiming or poi- soning livestock	94-8-106	Cruelty to animals
1209	Killing, maiming or poi- soning livestock—com- plaint	None	
1301	Duel defined	94-5-201 94-8-101	Assault Disorderly conduct
1302	Punishment for fighting a duel, when death en- sues	94-5-102 94-5-104 94-8-105	Deliberate homicide Negligent homicide Use of force by aggressor
1303	Punishment for fighting a duel, although death does not ensue	94-5-202 94-5-201 94-8-101	Aggravated assault Assault Disorderly conduct
1304	Posting for not fighting	94-5-203	Intimidation
1305, 1306	Officers must prevent duels. Evading dueling laws	None	
1307	Witness' privilege	95-1807	Immunity of witness
1401 to 1476	Election frauds and of- fenses	23-4701 et seq.	Miscellaneous amendments and repeals
1501	Embezzlement by public officer	94-7-209 94-7-401 94-6-302	Tampering with public rec- ords or information Official misconduct Theft
1502 to 1504	Officers neglecting to pay over public moneys and fines	94-6-302 94-7-401	Theft Official misconduct
1505	Obstructing officer in col- lecting revenue	94-7-302	Obstructing a peace officer or public servant
1506	Refusing to give assessor list of property or giv- ing false name	94-7-302 94-7-204 84-412	Obstructing a peace officer or public servant Unsworn falsification to au- thorities Powers of department
1507	Making false statement, not under oath in refer- ence to taxes	94-7-204 94-7-203	Unsworn falsification to au- thorities False swearing
1508	Delivering receipts for poll taxes other than prescribed by law, or collecting poll taxes, etc. without giving the receipt prescribed by law	94-7-401	Official misconduct
1509	Having blank receipts for licenses other than those prescribed by law	94-7-401 94-6-302	Official misconduct Theft

**CRIMINAL CODE OF 1973**

<b>R.C.M., 1947 Title 94 Old Section</b>	<b>Subject Matter</b>	<b>Montana Criminal Code of 1973</b>	<b>Subject Matter</b>
1510	Refusing to give name of person in employment	94-7-302(1) 84-4950, 84-4954	Obstructing a peace officer or public servant Violations by employer
1511	Carrying on business without license	84-3209	Penalty for failure to procure license
1512	Unlawfully acting as auctioneer	66-228	Penalty—public auction
1513	Officer charged with collection, etc., of revenue, refusing to permit inspection of his books	94-7-302	Obstructing a peace officer or public servant
1514	Board of examiners, auditor and treasurer neglecting certain duties	94-7-401	Official misconduct
1515	Having state arms, etc.	94-6-302	Theft
1516	Selling state arms, etc.	94-6-302	Theft
1517	Sheriff falsely representing accounts	94-7-401 94-6-302 25-225, 25-229	Official misconduct Theft Sheriff, penalties
1518	Trespass on public property	94-6-203	Criminal trespass to property
1519	Limitations on preceding section	None	
1601, 1602	Extortion	94-5-203 94-5-301 94-6-302(2) 94-6-307	Intimidation Unlawful restraint Theft Deceptive practices
1603	Punishment of extortion in certain cases	94-6-302	Theft
1604	Obtaining signature by means of threats	94-6-302 94-6-307	Theft Deceptive practices
1605	Compulsion to execute instrument	94-6-302 94-6-307	Theft Deceptive practices
1606	Oppression committed under color of official right	94-6-302 94-5-201 94-5-302 94-7-210	Theft Assault Kidnaping Impersonating a public officer
1607, 1608	Extortion committed under color of official right	94-7-401 94-6-302 94-7-210	Official misconduct Theft Impersonating a public officer
1609	Blackmail	94-6-302 94-5-203	Theft Intimidation
1610	Written threats	94-5-203	Intimidation
1611	Verbal threats	94-6-302 94-5-203	Theft Intimidation
1612	Unlawful threat referring to act of third party	94-6-302	Theft
1613	Employee of railroad company taking more fare, etc.	94-6-302 94-6-307	Theft Deceptive practices



# CROSS REFERENCE TABLE

R.C.M., 1947 Title 94 Old Section	Subject Matter	Montana Criminal Code of 1973	Subject Matter
1614	Requiring release of liability, etc.	94-5-203 13-803	Intimidation Employer's rights
1615	Extortion—refusal to pay wages without discount	94-6-302 94-5-203 41-1302	Theft Intimidation Penalty for failure to pay
1616	Receipt or solicitation of gifts by foreman from employees	94-5-203 94-6-302	Intimidation Theft
1617	Immunity of witnesses	95-1807	Immunity of witnesses
1701	Offering false evidence	94-7-203 94-7-204 94-7-208	False swearing Unsworn falsification to authorities Tampering with or fabricating physical evidence
1702	Deceiving a witness	94-7-204 94-7-208 94-7-207	Unsworn falsification to authorities Tampering with or fabricating physical evidence Tampering with witness and informants
1703	Preparing false evidence	94-7-208(1)(b)	Tampering with or fabricating physical evidence
1704	Destroying evidence	94-7-208(1)(a)	Tampering with or fabricating physical evidence
1705	Preventing or dissuading witness from attending	94-5-203 94-7-207	Intimidation Fabricating physical evidence
1706	Bribing witness	94-7-102 94-7-207 94-5-203	Bribery in official and political matters Tampering with witnesses and informants Intimidation
1707	Receiving or offering to receive bribes	94-7-102	Bribery in official and political matters
1801	Marrying under false personation	94-7-203	False swearing
1802	Falsely personating another in other cases	94-6-102 94-7-203 94-7-204 94-7-209	Criminal mischief False swearing Unsworn falsification to authorities Tampering with public records or information
1803	False statement respecting financial condition	94-6-307 94-6-302	Deceptive practices Theft
1804	Receiving property in a false character	94-6-302	Theft
1805	Obtaining money, property or services by false pretenses	94-6-307 94-6-302	Deceptive practices Theft
1806	Confidence games	94-6-302 94-6-307	Theft Deceptive practices
1807	Selling land twice	94-6-302 94-2-101(48)	Theft Definition of "property"

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R.C.M., 1947 Title 94 Old Section	Subject Matter	Montana Criminal Code of 1973	Subject Matter
1808	Married person selling land under false representations	94-6-302 94-6-307	Theft Deceptive practices
1809	Mock auction	94-6-302 94-6-310 94-6-301 94-6-307	Theft Forgery Definition of terms Deceptive practices
1810	Consignee, false statement by	94-6-307 94-6-302	Deceptive practices Theft
1811	Selling or removing mortgaged property to defraud mortgagee	94-6-313	Defrauding creditors Removing mortgaged property
1812	Conditional sale or lease —removal, sale or concealment of property to defraud vendor or lessor	94-6-313	Defrauding creditors Removing mortgaged property
1813	False pedigree of animals, etc.	94-6-307 94-6-310	Deceptive practices Forgery
1814	Selling animal with false pedigree	94-6-307 94-6-308	Deceptive practices Deceptive business practices
1815	Use of false pretenses in selling mines	94-6-307	Deceptive practices
1816	Interference with samples for assay	94-6-302	Theft
1817 to 1823	False samples advertising, personation and credit cards	94-6-307 94-6-308	Deceptive practices Deceptive business practices
1824	Unlawful to obtain communication services without intention to pay	94-6-302 94-6-304	Theft Theft of labor or service or use of property
1825 to 1830	False use of credit cards	94-6-310 94-6-307 95-402	Forgery Deceptive practices Venue
1831	Obtaining accommodations with intent to defraud	94-6-304	Theft of labor or service or use of property
1832 to 1834	Chain distributor schemes	94-6-308.1	No change in text
1901 to 1904	False weights and measures	Title 90, ch. 1 94-6-302 94-6-308	Weights and measures Theft Deceptive business practices
2001	Forgery of wills, conveyances, etc.	94-6-310	Forgery
2002	Making false entries in records or returns	94-6-310	Forgery
2003	Forgery of public or corporate seal	94-7-204 94-6-310	Unsworn falsification to authorities Forgery
2004	Punishment of forgery	94-6-310	Forgery

# CROSS REFERENCE TABLE

R.C.M., 1947 Title 94 Old Section	Subject Matter	Montana Criminal Code of 1973	Subject Matter
2005	Forging telegraphic mes- sages	94-6-310	Forgery
2006	Possessing or receiving forged or counterfeit bills or notes with in- tent to defraud	94-6-310	Forgery
2007	Making, passing or utter- ing fictitious bills, etc.	94-6-309	Issuing a bad check
2008 to 2014	Forgery and counterfeit- ing	94-6-310	Forgery
2101 to 2104	Fraudulent conveyances	94-6-313 29-101 to 29-113	Defrauding creditors Fraudulent conveyances
2201	Repealed in 1947		
2202	Presenting false proofs upon policy of insur- ances	94-6-302 94-6-307 94-6-310 94-6-102	Theft Deceptive practices Forgery Criminal mischief
2301	Fraud in publishing false statement of concern	94-6-308 94-6-307	Deceptive business practices Deceptive practices
2302	Frauds in subscription for stock of corpora- tions	94-6-310 94-6-302	Forgery Theft
2303	Fraudulent issue of stock, scrip, etc.	94-6-302	Theft
2304	Frauds in procuring or- ganizations, etc., of corporation	94-7-204 94-6-310	Unsworn falsification to au- thorities Forgery
2305	Unauthorized use of name in prospectus, etc.	94-6-307 94-6-310	Deceptive practices Forgery
2306	Misconduct of directors of stock corporation	94-2-113 94-6-302	Accountability for conduct of corporation Theft
2307	Savings bank officer over- drawing his account	94-6-302	Theft
2308	Frauds in keeping ac- counts in books of cor- poration	94-6-302	Theft
2309	Officer of corporation publishing false reports	94-6-307	Deceptive practices
2310	Officer of corporation re- fusing to permit an in- spection	None	
2311, 2312	Officer of railroad com- pany contracting debt in its behalf exceeding its available means	94-2-113 94-6-302	Accountability for conduct of corporation Theft
2313	Director of corporation presumed to have knowledge	94-2-113	Accountability for conduct of corporation
2314	Director present at meet- ing, when presumed to have assented to pro- ceedings	94-2-107 94-2-113	When accountability exists Accountability for conduct of a corporation



# CRIMINAL CODE OF 1973

R.C.M., 1947 Title 94 Old Section	Subject Matter	Montana Criminal Code of 1973	Subject Matter
2315	Director absent from meetings, when presumed to have assented to proceedings	94-2-107 94-2-113	When accountability exists Accountability for conduct of corporation
2316	Offenses relating to foreign corporations	94-2-112	Criminal responsibility of corporations
2317	Foreign corporations doing business in violation	None	
2318	Agent not complying with foreign corporation requirements	94-2-108	Separate conviction of persons accountable
2319	Corporation not complying with laws	None	
2320	Agent of noncomplying corporation	94-2-108	Separate conviction of persons accountable
2321	Director defined	None	
2322 to 2325	Frauds in management of corporations	15-22-141 to 15-22-144	No change in text
2401 to 2424	Gambling	94-8-401 to 94-8-424	No change in text
2425	Repealed in 1965		
2426 to 2428	Gambling	94-8-425 to 94-8-427	Repealed
2429 to 2432	Slot machines	94-8-428 to 94-8-431	No change in text
2501	Murder defined	94-5-101 94-5-102	Criminal homicide Deliberate homicide
2502	Malice defined — express or implied	None	
2503	Degrees of murder	94-5-101(2)	Classes of criminal homicide
2504	Repealing clause	None	
2505	Punishment for murder	94-5-102 94-5-103 94-5-104	Deliberate homicide Mitigated deliberate homicide Negligent homicide
2506	Petit treason abolished	None	
2507, 2508	Manslaughter, voluntary and involuntary	94-5-103 94-5-104	Mitigated deliberate homicide Negligent homicide
2509	Deceased must die within a year and a day	None	
2510	Proof of corpus delicti	95-3004(a)	The burden in homicide trial
2511	Excusable homicide	94-3-101 to 94-3-112	Justifiable use of force
2512	Justifiable homicide by public officer	94-3-109 94-3-106	Execution of death sentence Use of force to prevent escape
2513 to 2515	Justifiable and excusable homicide and bare fear	94-3-102 94-3-103	Use of force in defense of person Use of force in defense of dwelling

# CROSS REFERENCE TABLE

E.C.M., 1947 Title 94 Old Section	Subject Matter	Montana Criminal Code of 1973	Subject Matter
		94-3-104	Use of force in defense of other property
		94-3-105	Use of force by aggressor
		94-3-106	Use of force to prevent escape
		95-602	Arrest
2601	Kidnaping—place of trial	94-5-302	Kidnaping
		95-411	Venue
2602	Kidnaping with intent to send person from state or confine within state—place of trial	94-5-303	Aggravated kidnaping
		95-411	Venue
2603	Enticing away child	94-5-305	Custodial interference
2604	Prisoner holding hostage	94-5-303	Aggravated kidnaping
2701	Larceny defined	94-6-302	Theft
2702	Uttering fraudulent check or drafts—evidence	94-6-309	Issuing a bad check
2703, 2704	Grand and petit larceny	94-6-302	Theft
2704.1	Possession of stolen livestock as evidence of larceny	94-6-314	Effect of possession of stolen property
2705	Petit larceny defined	94-6-302	Theft
2706	Punishment of grand larceny	94-6-302	Theft
2707	Punishment of petit larceny	94-6-302	Theft
2708	Dogs, property	94-2-101(48)	Definition of "property"
2709	Larceny of lost property	94-6-303	Theft of lost or mislaid property
2710	Larceny of written instruments	94-2-101(48)	Definition of "property"
2711	Value of passage tickets	94-2-101(48)	Definition of "property"
2712	Written instruments completed but not delivered	94-6-302	Theft
		94-2-101(48)	Definition of "property"
2713	Severing and removing part of the realty	94-2-101(48)	Definition of "property"
		94-6-302	Theft
2714	Larceny and receiving stolen property out of the state	94-6-302	Theft
		95-304	Venue
2715	Conversion by fiduciary, larceny	94-6-302	Theft
2716	Verbal false pretense, not larceny	94-2-101(11)(a)	Definition of "deception"
2717	Claim of title, restoration of property as defense	94-6-306	Offender's interest in the property
2718, 2719	Larceny of water, gas and electricity	94-6-302	Theft
		94-2-101(48)	Definition of "property"
2720	False device for measuring gas, water, electricity	94-2-101(48)	Definition of "property"
		94-6-302	Theft
		94-6-304	Theft of labor, services or use of property

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R.C.M., 1947 Title 94 Old Section	Subject Matter	Montana Criminal Code of 1973	Subject Matter
2721	Receiving stolen property	94-6-302 94-6-314	Theft Effect of possession of stolen property
2722	Larceny, destruction etc., of records by officers	94-7-209	Tampering with public records or information
2723 to 2726	Larceny and falsification of public records and jury lists	94-7-209	Tampering with public records or information
2801, 2802	Libel	94-8-111	Criminal defamation
2803	Malice presumed	None	
2804 to 2809	Libel	94-8-111	Criminal defamation
2810	Threatening libel to extort	94-6-302(2)	Theft
2811	Giving false information for publication	94-8-111	Criminal defamation
2901	Preventing the meeting or organization of legislative assembly	94-7-302 94-8-101	Obstructing a peace officer or public servant Disorderly conduct
2902	Disturbing the legislative assembly while in session	94-7-302 94-8-101(1)(g)	Obstructing a peace officer or public servant Disorderly conduct
2903	Altering draft of bill or resolution	94-7-209	Tampering with public records or information
2904	Altering engrossed or enrolled copy of bill or resolution	94-7-209	Tampering with public records or information
2905 to 2909	Legislative bribes	94-7-102	Bribery in official and political matters
2910	Solicitation of bribery	94-7-102 94-4-101	Bribery in official and political matters Solicitation
2911	Personal interest in bill	94-7-401	Official misconduct
2912	Witnesses refusing to attend	43-401 to 43-405	Witnesses before the legislative assembly
2913	Lobbying	95-1807 94-7-102(1)	Immunity from prosecution Bribery
2914	Members of legislative assembly, in addition to other penalties to forfeit office, etc.	94-7-401(4)	Official misconduct
2915 to 2919	Legislative bribes	94-7-102	Bribery in official and political matters
3001 to 3011	Lotteries	94-8-301 to 94-8-311	No change in text
3101 to 3108	Machine Gun Act	94-8-201 to 94-8-208	No change in text
3109	Search warrant	None	
3110	Uniformity of interpretation	94-8-209	No change in text
3111	Short title	None	



# CROSS REFERENCE TABLE

R.C.M., 1947 Title 94 Old Section	Subject Matter	Montana Criminal Code of 1973	Subject Matter
3201	Repealed in 1965		
3202	Injuries to milestones, guideposts, trees	94-6-102	Criminal mischief
3203	Tampering with tele- graph, telephone, and electric system	94-6-102 94-6-302	Criminal mischief Theft
3204	Taking water from or obstructing canals	94-6-102 94-6-302	Criminal mischief Theft
3205, 3206	Interference with rail- road property	94-6-102	Criminal mischief
3207	Acts causing death pun- ished as murder	94-5-102	Deliberate homicide
3208	Remove waste or packing from locomotives or motors	94-8-108 94-6-102	Creating a hazard Criminal mischief
3209	Repealed in 1963		
3210	Highway construction— leaving hard substance on railroad intersection	94-8-108	Creating a hazard
3211	Removal, injury or de- struction of telephone, telegraph and electric facilities	94-6-102	Criminal mischief
3301	Malicious injury or de- struction of property	94-6-102	Criminal mischief
3302	Specification in following sections not restriction	None	
3303	Burning buildings, etc., not the subject of arson	94-6-104 94-6-102 94-6-103	Arson Criminal mischief Negligent arson
3304	Destruction of buildings by explosives	94-6-102 94-6-104	Criminal mischief Arson
3305	Use of automobiles with- out consent of owners	94-6-203 94-6-202 94-6-305	Criminal trespass to property Criminal trespass to vehicles Unauthorized use of motor vehicles
3306, 3307	Possessing automobile from which number or marks have been re- moved or altered	94-6-311	Obscuring the identity of a machine
3308	Malicious injuries to free- hold	94-6-102	Criminal mischief
3309	Injuring fences, building fires, and hunting on premises of another when forbidden	94-6-201 94-6-203 94-6-102	Definition of terms Criminal trespass to prop- erty Criminal mischief
3310	Injuries to standing crops	94-6-102	Criminal mischief
3311	Removing, defacing or altering landmarks	94-7-209 94-6-102	Tampering with public rec- ords or information Criminal mischief
3312 to 3314	Fences and dams—ma- licious mischief gen- erally	94-6-102	Criminal mischief
3315	Burning or injuring rafts, setting adrift vessels	94-6-103 94-6-104 94-6-102	Negligent arson Arson Criminal mischief
3316	Obstructing navigable waters	94-8-107(1)(c)	Public nuisance

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R.C.M., 1947 Title 94 Old Section	Subject Matter	Montana Criminal Code of 1973	Subject Matter
3317	Injuries to United States surveyor's monuments	94-7-209	Tampering with public rec- ords or information
		94-6-102	Criminal mischief
3318	Destroying or tearing down notices	94-7-209	Tampering with public rec- ords or information
		94-6-102	Criminal mischief
3319	Injuring or destroying written instrument	94-6-102	Criminal mischief
3320 to 3323	Letters and telegrams	94-8-114	Privacy in communications
3324 to 3326	Destroying art, literature and malicious mischief generally	94-6-102	Criminal mischief
3327, 3328	Setting and negligent control of fires	28-115	Failure to extinguish fire
		94-6-103	Negligent arson
3329	Setting fire to timber, etc., maliciously	28-115	Failure to extinguish fire
		94-6-104	Arson
3330	Exposing infected cloth- ing or person	69-4509	Duties of public health of- ficers
3331	Driving animals on a sidewalk	94-8-101(1) (e) or (i)	Disorderly conduct
3332	Malicious spiking of saw logs	94-6-102	Criminal mischief
3333	Defacing public buildings	94-6-102	Criminal mischief
3334	Injury to trees on public lands	94-6-102	Criminal mischief
3335 to 3344	Malicious mischief gen- erally	None	
3401, 3402	Mayhem	94-5-202	Aggravated assault
3501	Administrator, etc., must file report—penalty	94-7-401 Title 91, ch. 5	Official misconduct
		Title 91, ch. 6	Escheated estates—inherit- ance by nonresident aliens —disposal of unclaimed property
			Probate proceedings—public administrator
3502	Adulterating foods, drugs, liquors, etc.	4-1-201	Sale of liquor unlawful— foreign substance in liquor —possession of liquor
		27-703	Prohibited acts enumerated
		27-705	Criminal penalties for pro- hibited acts—reliance on guaranty or undertaking as defense
		27-710	Adulterated food defined
		66-1524	Quality of drugs sold—adul- teration
		94-6-308	Deceptive business practices
3503	Adulterated candies	27-703	Prohibited acts enumerated
		27-705	Criminal penalties for pro- hibited acts—reliance on guaranty or undertaking as defense
		27-710	Adulterated food defined
		94-6-308	Deceptive business practices

## CROSS REFERENCE TABLE

R.O.M., 1947 Title 94 Old Section	Subject Matter	Montana Criminal Code of 1973	Subject Matter
3504	Altering brands	94-6-312	Illegal branding or altering or obscuring a brand
3505	Apothecary omitting to label drugs or labeling them wrongfully, etc.	94-6-308 66-1510 66-1515 66-1523 66-1502	Deceptive business practices Sale of poisons regulated Penalty for violation of act Wrongful labeling Terms defined
3506	Arrests, seizures or levy upon property, disposition of lands without lawful authority, issuance by justice of the peace of writs or process signed or process signed in blank	94-7-401 93-7702	Official misconduct Duties of justice of the peace
3507	Attorneys — misconduct by	93-2105 93-2106 93-2108  94-6-302	Punishment for deceit Punishment for willful delay Certain other transaction prohibited—penalty Theft
3508	Attorneys — buying demands or suits by	93-2107, 93-2108	Attorney acquiring claims for purpose of bringing action
3509	Attorney forbidden to defend prosecutions carried on by their partners or formerly by themselves	93-2111 93-2112, 93-2114	Partner of public prosecutor not to defend, etc. Former public prosecutors not to defend, etc.
3510	Attorney may defend self	93-2116	Attorney may defend in person when prosecuted
3511, 3512	Barber business, conducting on Sunday	None	
3513	Repealed in 1953		
3514	Brands—sash or frying pan prohibited	94-6-312 46-603 46-604 46-606 46-608	Illegal branding or altering or obscuring a brand Recording of brands required Application for recording record of brands Right of owner of recorded brand Penalty for violation of act
3515, 3516	Branding stock driven into or through state required	Title 46, ch. 6 94-6-310	Brands—recording Forgery
3517 to 3520	Branding — miscellaneous offenses	Title 46, ch. 6	Brands—recording
3521	Fines, disposition	None	
3522	Branding cattle running at large	46-1720	No change in text
3523	Bribing members of city or town councils, boards of county commissioners or trustees	94-7-102	Bribery in official and political matters
3524	Bringing armed men into the state	94-7-504	Bringing armed men into the state
3525 to 3527.1	Carrying concealed weapons	94-8-210 to 94-8-213	No change in text



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R.C.M., 1947 Title 94 Old Section	Subject Matter	Montana Criminal Code of 1973	Subject Matter
3528	Arrest without warrant	94-7-401	Official misconduct
3529 to 3532	Concealed weapons—permit	94-8-214 to 94-8-217	No change in text
3533, 3534	Common barratry	93-2105	Punishment for deceit
3535	Compounding crimes	94-7-305	Compounding a felony
3536, 3537	Compulsory company boarding houses	None	
3538	Resisting process after county declared in state of insurrection	94-7-302	Obstructing a peace officer or public servant
3539	Incestuous or forbidden marriages	94-5-605, 94-5-606 94-2-107 94-7-401	Marrying a bigamist When accountability exists Official misconduct
3540	Criminal contempt	94-7-309	Contempt
3541	Cruel treatment of lunatics, etc.	None	
3542	Dead animals—offal, etc., putting in street, rivers, etc.	69-4518 69-4519	Dead animals—unlawful disposition Penalty
3543	Deadly weapons exhibiting in rude, etc., manner or using unlawfully	94-5-201 94-8-101	Assault Disorderly conduct
3544	Death from explosions, etc.	94-5-104	Negligent homicide
3545	Death from collision on railroads	94-5-104	Negligent homicide
3546	Death from mischievous animals	94-5-104	Negligent homicide
3547	Debtor fraudulently concealing his property	94-6-313	Defrauding creditors
3548	Litigant fraudulently concealing his property	94-6-313	Defrauding creditors
3549	Defacing marks on logs, lumber or wood	94-6-102	Criminal mischief
3550	Repealed in 1967		
3551, 3552	Depositing coal slack in streams	69-4905 69-4908 69-4806	Prohibited acts Penalty Pollution unlawful—permits
3553	Disclosing indictment found	94-7-401 95-1409	Official misconduct Secrecy of proceedings and disclosure
3554	Disclosing what transpired before the grand jury	95-1409 94-7-401	Secrecy of proceedings and disclosure Official misconduct
3555	Discharged employees, protection	41-1325	No change in text

# CROSS REFERENCE TABLE

R.C.M., 1947 Title 94 Old Section	Subject Matter	Montana Criminal Code of 1973	Subject Matter
3557, 3558	Discrimination by hospitals	64-301	Freedom from discrimination as civil right—employment—public accommodation
		64-303	Discrimination as a misdemeanor
		69-5217, 69-5221	Discrimination among patients of physicians
		69-5313	Discrimination prohibited in subsidized facilities
3559	Diseased animals	46-236	Duty to report contagious diseases
		46-237	Diseased animals not to run at large—burial of carcasses
		46-238	Penalty for violation
3560 to 3563	Disturbing the peace	94-8-101	Disorderly conduct
3564	Police power of railroad conductors	None	
3565	Ditch overflowing on highway	94-8-107	Public nuisance
3566	Divorce—advertising to procure	None	
3567 to 3569	Livestock—miscellaneous offenses	46-3001 to 46-3003	No change in text
3570 to 3572	Entertainment in establishments licensed to sell beer	None	
3573	Repealed in 1959		
3574	Exhibiting deformities of persons	None	
3575	Exposing person infected with any contagious disease in a public place	69-4509	Functions, powers and duties of local boards of health
3576	False imprisonment	94-5-301	Unlawful restraint
3577	Fences, unlawful and dangerous	46-1403	Barbed wire fences to be kept in repair
		46-1404	Fallen wire fencing declared nuisance—abatement
3578 to 3578.2	Firing firearms	94-8-218 to 94-8-220	No change in text
3579, 3580	Firearms, use by children	94-8-221, 94-8-222	No change in text
3581 to 3583	Flag desecration	94-7-502	Desecration of flag
3584	Forcible entry and detainer	94-6-203	Criminal trespass to property
3585 to 3587	Fortunetelling	None	
3588	Fraudulent practices to affect the market price	94-6-302	Theft
		94-6-307(b)	Deceptive practice
3589	Fraudulent pretenses relative to birth of infant	94-7-209	Tampering with public records or information
		69-4413	Births—compulsory registration
		69-4436	False statements or information contained in records relating to vital statistics

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R.C.M., 1947 Title 94 Old Section	Subject Matter	Montana Criminal Code of 1973	Subject Matter
3590	Fraudulent pretenses — substituting one child or another	94-5-301 94-5-302	Unlawful restraint Kidnaping
3591, 3592	Gas masks for employees handling crude oil and gas	41-1710, 41-1718	Employers to furnish and require safety devices and practices
3593, 3594	Glanders—disposition of infected animal	46-211 46-238 46-903, 46-905	Promulgation of rules Penalty for violation of act Quarantine of diseased ani- mals—proceeds from sale of stock
3595	Grand juror acting after challenge has been al- lowed	94-7-210	Impersonating a public of- ficer
3596	Habeas corpus, refusing to issue or obey writ	94-7-401 95-2710	Official misconduct Production of person
3597	Reconfining persons dis- charged on habeas cor- pus	94-7-401 94-5-302 95-2710	Official misconduct Kidnaping Production of person
3598	Concealing persons en- titled to habeas corpus	95-2710 94-7-401 94-5-305	Production of person Official misconduct Custodial interference
3599	Health laws—willful vio- lation	69-5701	Violations of public health laws or rules of state board of health
35-100	Health laws—neglecting to perform duties	94-7-401 69-5701	Official misconduct Violations of public health laws or rules of state board of health
35-101	Horses, etc., taking up or restraining without owner's consent	94-6-102	Criminal mischief
35-102, 35-103	Repealed in 1953		
35-104	Innkeepers and carriers refusing to receive guests	64-301 to 64-303	Freedom from discrimination
35-105	Inspection of mines, un- safe dams and reser- voirs	95-2206.3	When no penalty is specified
35-106	Intoxicating liquors—giv- ing or selling to minor	94-5-609	Unlawful transactions with minors
35-106.1	Jurisdiction of offenses	95-302 95-304	Jurisdiction of justices of peace State criminal jurisdiction
35-106.2	Possession of beer or liq- uor by minor	94-5-610	Possession of intoxicating substances by minors
35-107	"Intoxicating" liquor de- fined	94-2-101(24)	Definition of "intoxicating substance"
35-108	Intoxicated physicians	None	
35-109	Intoxication of engineers, conductors or drivers of locomotives or cars	72-671	No change in text
35-110	Issuing fictitious bills of lading, etc.	94-6-310 94-6-302	Forgery Theft
35-111	Issuing fictitious ware- house receipts	94-6-310 94-6-302	Forgery Theft



# CROSS REFERENCE TABLE

R.C.M., 1947 Title 94 Old Section	Subject Matter	Montana Criminal Code of 1973	Subject Matter
35-112	Erroneous bills of lading or receipts issued in good faith	None	
35-113	Duplicate receipts marked "duplicate"	94-6-310 94-6-302	Forgery Theft
35-114	Selling, etc., property re- ceived for transporta- tion or storage	94-6-302	Theft
35-115	Issuing or circulating paper money	94-6-310 94-6-302	Forgery Theft
35-116	Leaving gates open	94-6-102(d)	Criminal mischief
35-117 to 35-120	Obstructing shoreline	94-8-107	Public nuisance
35-121	False return or record of marriage	94-7-401 94-7-204 48-124	Official misconduct Unsworn falsification to au- thorities Penalty for failure to return or record
35-122	Maliciously procuring warrant	94-7-203	False swearing
35-123	Repealed in 1969		
35-124	Penalty for violation	None	
35-125	Mining shafts, drifts or cuts to be covered or fenced	94-8-108(b)	Creating a hazard
35-126 to 35-134	Mine shafts	None	
35-135, 35-136	Repealed in 1947		
35-137	Minors, admission to place of prostitution	10-617	Penalty for improper and negligent training of chil- dren
35-138	Minors under sixteen, permitting to frequent dance halls	None	
35-139	Obstructing attempts to extinguish fires	94-7-302	Obstructing a peace officer or public servant
35-140	Obstructing ford near ferry	None	
35-141	Omission of duty by pub- lic officer	94-7-401	Official misconduct
35-142	Offense for which no pen- alty is prescribed	95-2206.3	When no penalty is specified
35-143	Oppression and injury by an officer	94-7-401 94-8-113	Official misconduct Mistreating prisoners
35-144	Officers of fire depart- ments issuing false cer- tificates of exemption	94-7-401 11-2004, 11-2005	Official misconduct Exemption certificates
35-145 to 35-147	Oleomargarine, labeling and notice	94-6-308	Deceptive business practices
35-148	Repealed in 1969		
35-149, 35-150	Personating officer	94-7-210	Impersonating a public serv- ant

# CRIMINAL CODE OF 1973

R.C.M., 1947 Title 94 Old Section	Subject Matter	Montana Criminal Code of 1973	Subject Matter
35-151	Pesthouse — establishing or keeping within cit- ies, towns, etc.	69-4509  69-5213	Functions, powers and du- ties of local boards of health Rules and standards for long- term care facilities — adoption and publication by state board of health
35-152 to 35-152.18	Repealed in 1965		
35-153 to 35-162	Repealed in 1953		
35-163 to 35-165	Prize fights	None	
35-166	Public administrator, neglect or violation of duty by	94-7-401	Official misconduct
35-167, 35-168	Public nuisances defined	94-8-107	Public nuisance
35-169	Public officers, resisting in the discharge of their duties	94-7-302	Obstructing a peace officer or public servant
35-170	Public officers assaulting under color of author- ity	94-8-113 94-7-401 94-5-201 94-5-202	Mistreating prisoners Official misconduct Assault Aggravated assault
35-171	Putting extraneous sub- stances in packages sold by weight	94-6-308 94-6-302	Deceptive business practices Theft
35-172, 35-173	Sale of diseased car- casses without inspec- tion	46-247, 46-248	No change in text
35-174	Railroads—animals killed by	72-507	No change in text
35-175	Violating railroad regula- tions	72-219	Penalties
35-176	Repealed in 1969		
35-177	Refusing to aid officers in arrest	94-7-304	Failure to aid peace officer
35-178	Refusing to disperse	94-8-102	Failure to disperse
35-179	Removing skin of animal	69-4518, 69-4519	Dead animals—unlawful dis- position
35-180	Returning to take posses- sion of lands after being removed by legal proceedings	94-7-302 94-7-309	Obstructing a peace officer or public servant Criminal contempt
35-181, 35-182	Riot	94-8-103	Riot
35-183	Rout defined	94-4-103 94-8-103 94-8-104	Attempt Riot Incitement to riot
35-184 to 35-186	Sale or manufacture of Maxim silencers and various explosives for wrongful use	94-8-223 to 94-8-225	No change in text
35-187 to 35-189	Diseased sheep	46-237, 46-238	Diseased animals not to run at large—burial of car- casses

## CROSS REFERENCE TABLE

R.C.M., 1947 Title 94 Old Section	Subject Matter	Montana Criminal Code of 1973	Subject Matter
35-190 to 35-192	Importing diseased cat- tle	46-237, 46-238  46-245	Diseased animals not to run at large—burial of car- casses Governor may prohibit im- portation of animals from localities where disease exists
35-193	State veterinary surgeon —disobeying order of	46-210	Violation constitutes misde- meanor
35-194	Obstructing veterinary surgeon	94-7-302  46-210	Obstructing a peace officer or public servant Violation constitutes misde- meanor
35-195	Schoolteachers, abuse of	75-6110	Abuse of teachers
35-196	Selling horses at auction —recording sales	66-210	Book for livestock
35-197, 35-198	Selling merchandise at camp meeting	None	
35-199	Repealed in 1969		
35-200	Sheepherder — abandon- ment of sheep by	46-3004	No change in text
35-201	Stealing rides upon cars or locomotives	94-6-304  94-6-202	Theft of labor or services or use of property Trespass to vehicles
35-202	Stealing rides on trucks, rods or brake beams	94-6-304  94-6-202	Theft of labor or services or use of property Trespass to vehicles
35-203	Trainmen constituted peace officers	72-672	No change in text
35-204 to 35-207	Forfeiture of vehicles— Theft	46-3005 to 46-3008	No change in text
35-208	Tobacco sales to minors	None	
35-209, 35-210	Lawyers soliciting busi- ness	None	
35-211	Steam boilers— misman- agement	94-8-108	Creating a hazard
35-212	Steam boilers operating without license	69-1517	Operation of boiler or steam engine without license
35-213	Unsafe steam boilers	94-8-108 69-1517	Creating a hazard Operation of boiler or steam engine without license
35-214	False certificate of boiler inspection	94-7-204	Unsworn falsification to au- thorities
35-215	Suicide — aiding or en- couraging	94-5-101 94-5-106 94-2-107	Criminal homicide Aiding or soliciting suicide Accountability
35-216	Sunday, activities forbid- den on	None	
35-217	Tainted food, disposing of	27-703 27-710 94-6-308	Prohibited acts enumerated Adulterated food defined Deceptive business practices
35-218 to 35-221	Telegraph and miscel- laneous offenses	94-8-114	Privacy in communications
35-221.1 to 35-221.4	Party line violations	94-8-109	Failure to yield party line



# CRIMINAL CODE OF 1973

R.C.M., 1947 Title 94 Old Section	Subject Matter	Montana Criminal Code of 1973	Subject Matter
35-221.5, 35-221.6	Abuse, harassment or ex- tortion by telephone	94-8-114 95-404	Privacy in communications Where a person in one coun- ty commits or aids and abets the commission of an offense in another county
35-222 to 35-225	Toy pistols	None	
35-226 to 35-232	Trademarks, forgery, counterfeiting and un- lawful use	94-6-308 94-6-310	Deceptive business practices Forgery
35-233 to 35-236	Registration of trade- marks	85-101 to 85-105 94-6-308	Registration of trademarks Deceptive business practices
35-237, 35-238	Trespassing stock	94-6-203	Criminal trespass to prop- erty
35-239	Fines on trespassing stock	None	
35-240	Range stock exempt	None	
35-241	Unauthorized communi- cation with convict	94-7-307	Transferring illegal articles
35-242 to 35-244	Unlawful assembly—mis- cellaneous offenses	94-8-102 94-8-103	Failure to disperse Riot
35-245	Magistrate refusing or neglecting to disperse rioters	94-7-401	Official misconduct
35-246	Unlawful entries in horse races	62-505	Duties of commission and licensees—license fee
35-247	Name of race horse	62-505	Duties of commission and licensees—license fee
35-248	Vagrants	None	
35-249	Vending or coin-operated machines, operation with counterfeit slugs	94-6-302	Theft
35-250	Manufacturing tokens, etc., for unlawful use	94-6-310	Forgery
35-251, 35-252	Railroad safety violations	None	
35-253	Wearing certain uniforms prohibited	94-7-210	Impersonating a public serv- ant
35-254	Wearing mask or dis- guise	None	
35-255	Willfully poisoning food, medicine or water	94-5-202 94-6-102 94-4-103	Aggravated assault Criminal mischief Attempt
35-256, 35-257	Workmen — false repre- sentation to procure	41-118	Deceived employees—action for damages
35-258, 35-259	Endurance races of horses	94-8-106(1)(d)	Cruelty to animals
35-260	State tax stamp—failure to affix or cancel — counterfeiting	Repealed	
35-261	Importing or selling ma- chinery with altered, defaced or removed serial number	94-6-308(e) 94-6-311(b)	Deceptive business practices Obscuring the identity of a machine

# CROSS REFERENCE TABLE

R.C.M., 1947 Title 94 Old Section	Subject Matter	Montana Criminal Code of 1973	Subject Matter
35-262	Altering, defacing or removing serial number of farm machinery	94-6-311	Obscuring the identity of a machine
35-263	Penalty	94-6-311	Obscuring the identity of a machine
35-264	Furnishing articles to and receiving from prisoners in state prison	94-7-307	Transferring illegal articles
35-265	Abandoning or permitting abandoned icebox in dangerous condition	94-8-108(1)(a)	Creating a hazard
35-266 to 35-268	Repealed in 1959		
35-269	Hunting in careless or reckless manner—failure to assist person injured	94-8-108(1)(e)	Creating a hazard
35-270, 35-271	Delivery of grain containing toxic chemicals to public warehouses	3-234, 3-235 94-6-308 27-703 27-710 27-713	No change in text Deceptive business practices Prohibited acts enumerated Adulterated food defined Additives to conform to regulations
35-271.1 to 35-271.3	Coloration of grain treated with injurious or toxic substances	3-236 to 3-238 94-6-308 27-703 27-710 27-713  27-720  27-705	No change in text Deceptive business practices Prohibited acts enumerated Adulterated food defined Additives to conform to regulations False advertising — representation of curative properties Criminal penalties for prohibited acts—reliance on guaranty or undertaking
35-272	Unlawful operation, use, interference, or tampering of aircraft — penalty	94-8-108 94-6-305	Creating a hazard Unauthorized use of motor vehicles
35-273	Switchblade knives—possession, selling, using, giving, or offering for sale	94-8-226	No change in text
35-274, 35-275	Recording of conversation	94-8-114(1)(c)	Privacy in communications
3601, 3602	Obscene literature	94-8-110	Obscenity
3603	Indecent exposure, exhibitions and pictures	94-8-110 94-5-504 94-8-101	Obscenity Indecent exposure Disorderly conduct
3604	Seizures of indecent articles authorized	95-702  95-705	Scope of search without warrant Scope of search with warrant

# CRIMINAL CODE OF 1973

R.C.M., 1947 Title 94 Old Section	Subject Matter	Montana Criminal Code of 1973	Subject Matter
3605	Indecent character summarily determined	95-712	Return to court of things seized under search warrant
		95-713	Custody and disposition of things seized under search warrant
		95-714	Custody and disposition of things seized without search warrant
3606	Destruction of indecent articles	None	
3607	Keeping or residing in a house of ill fame	94-5-603	Promoting prostitution
3608	Keeping disorderly houses	94-5-603 94-8-107	Promoting prostitution Public nuisance
3609	Advertising to produce miscarriage	None	
3610	Enticing to place of gambling or prostitution	94-5-603 94-4-101	Promoting prostitution Solicitation
3611 to 3615	Advertising cures	None	
3616 to 3619	Repealed in 1973		
3620 to 3623	Contraceptive drugs or devices	94-8-110.2	No change in text
3624 to 3626	Public display of offensive sexual material	94-8-110.1	No change in text
3701	Pawnbrokers — doing business without a license	66-1601 84-3201	Interest pawnbrokers may receive Billiard tables—pawnbroker—theaters, etc.
		95-2206.3	When no penalty is specified
3702	Failure to keep register	66-1606 95-2206.3 94-5-609	Must keep register When no penalty is specified Unlawful transactions with minors
3703	Rate of interest	66-1601	Interest pawnbrokers may receive
		95-2206.3	When no penalty is specified
3704	Failure to produce register for inspection	66-1606 95-2206.3	Must keep register When no penalty is specified
3801	Perjury defined	94-7-202	Perjury
3802	Oath defined	94-7-202	Perjury
3803	Oath of office	None	
3804, 3805	Witnesses before legislative assembly	94-7-202 94-7-203	Perjury False swearing
3806 to 3808	Perjury	94-7-202	Perjury
3809	Making depositions, etc., when deemed complete	94-7-202 94-7-101	Perjury Definition of terms
3810	Statement of that which one does not know to be true	None	
3811	Punishment of perjury	94-7-202	Perjury
3812	Subornation of perjury	94-7-202 94-4-101	Perjury Solicitation
3813	Procuring the execution of innocent person	94-5-101	Criminal homicide



## CROSS REFERENCE TABLE

R.C.M., 1947 Title 94 Old Section	Subject Matter	Montana Criminal Code of 1973	Subject Matter
3901, 3902	Acting in a public capacity without being qualified	None	
3903	Giving or offering bribes to executive officers	94-7-102	Bribery in official and political matters
3904	Asking or receiving bribes	94-7-102	Bribery in official and political matters
3905	Resisting officers	94-4-101 94-7-302	Solicitation Obstructing a peace officer or public servant
3906	Extortion	94-7-303 94-6-302 94-7-401 94-7-102	Obstructing justice Theft Official misconduct Bribery in official and political matters
3907	Officers illegally interested in contracts	94-7-401 59-501  59-502 59-503	Official misconduct Certain officers not to be interested in contracts Interest in certain sales Contracts in violation, voidable
3908	Fraudulent bills or claims presented for allowance or payment	94-7-401 94-6-302 94-6-310	Official misconduct Theft Forgery
3909	Buying appointments to office	94-7-102	Bribery in official and political matters
3910	Taking rewards for deputation	94-7-102  94-7-105	Bribery in official and political matters Gifts to public servants by persons subject to their jurisdiction
3911	Exercising functions of office wrongfully	94-7-210	Impersonating a public officer
3912	Refusal to surrender books, etc., to successor	59-531  94-7-401 94-7-209	Proceedings to compel delivery of Official misconduct Tampering with public records or information
3913	Scope of application of chapter	None	
3914	False certificates by public officers	94-7-209  94-7-203	Tampering with public records or information False swearing
3915	Officer refusing to receive or arrest parties charged with crime	94-7-401 16-2702 95-603	Official misconduct Duties of sheriff Issuance and service of arrest warrant upon complaint
3916	Delaying to take person arrested before a magistrate	94-7-401 16-2702 95-901	Official misconduct Duties of sheriff Duty of person who has made an arrest
3917	Inhumanity to prisoners	94-8-113	Mistreating prisoners
3918, 3919	Confessions obtained by duress or inhuman practices	94-8-113	Mistreating prisoners
3920	Importing persons to discharge duties of peace officers prohibited	94-7-504	Bringing armed men into the state

# CRIMINAL CODE OF 1973

R.C.M., 1947 Title 94 Old Section	Subject Matter	Montana Criminal Code of 1973	Subject Matter
4001, 4002	Prohibited pool games	None	
4003	Closing hour for pool halls, billiard halls and bowling alleys	None	
4004	Permitting minors in pool or billiard hall	10-617	Improper and negligent training of children
4005	Penalty for violation of act	None	
4101	Rape defined	94-5-503	Sexual intercourse without consent
4102	When physical ability must be proved	94-5-503	Sexual intercourse without consent
4103	Penetration sufficient	94-2-101(55), 94-5-501	Definition of "sexual inter- course"
4104	Punishment for rape	94-5-502	Sexual assault
4105	Abduction of women	94-5-302	Kidnaping
		94-5-203	Intimidation
		94-5-603	Promoting prostitution
4106	Lewd and lascivious acts upon children	94-5-502	Sexual assault
		94-5-503	Sexual intercourse without consent
		94-5-505	Deviate sexual conduct
4107	Open and notorious adul- tery and fornication	None	
4108	Seduction	None	
4109 to 4117	Other sexual crimes	94-5-603	Promoting prostitution
4118	Crime against nature	94-5-505	Deviate sexual conduct
4119	Penetration sufficient	94-2-101(55)	Definition of "sexual inter- course"
4120	Child under sixteen can- not be accomplice	94-5-505	Deviate sexual conduct
		94-5-501	Definition of terms
		94-2-107(3)(a)	Accountability of victim
4201	Rescuing prisoners	94-5-305	Custodial interference
4202	Retaking goods from cus- tody of officer	94-6-302	Theft
4203	Escapes from state prison	94-7-306	Escape
4204	Attempt to escape from state prison	94-7-306 94-4-103	Escape Attempt
4205	Escapes from other than state prisons	94-7-306	Escape
4206	Officers suffering convicts to escape	94-7-306	Escape
4207	Assisting prisoners to es- cape	94-7-306	Escape
4208	Carrying into prison things useful to aid in an escape	94-7-306 94-7-307	Escape Transferring illegal articles
4209	Expense of trial for es- cape	80-1912	Minor changes in text
4301 to 4303	Robbery	94-5-401	Robbery
4401 to 4406	Sedition—criminal syndi- calism—sabotage	94-7-503 94-6-102	Criminal syndicalism Criminal mischief
4407, 4408	Assembling to advocate forbidden acts	94-8-103 94-7-503	Riot Criminal syndicalism
4409, 4410	Red flag or emblem, dis- play	None	
4411 to 4427	Subversive organiza- tions, registration	None	
4501, 4502	Treason and misprision of treason	None	

# CROSS REFERENCE TABLE

R.C.M., 1947 Title 94 Old Section	Subject Matter	Montana Criminal Code of 1973	Subject Matter
4601, 4602	Unlawful removal of dead body	Title 69, ch. 23 94-6-102	Anatomical Gift Act
4603	Duty of burial	69-5106 9-601	Criminal mischief Unauthorized post-mortem examinations Persons authorized to con- trol disposition
4604	Omitting to bury	None	
4605	Custody of body	9-601	Persons authorized to con- trol disposition
4606	Arresting or attaching a dead body	None	
4607	Defacing tombs or monu- ments	94-6-102	Criminal mischief
4701 to 4703	Punishments — attempts and other general pro- visions	95-1711	Effect of former prosecu- tion
4704	Contempts, how punish- able	94-7-309 94-1-104(2)	Criminal contempt Contempt powers preserved
4705	Mitigation of punish- ment in certain areas	None	
4706	Aiding in misdemeanor	94-2-107 94-2-108 94-4-101 94-4-102 94-4-103	When accountability exists Separate convictions of per- sons accountable Solicitation Conspiracy Attempt
4707	Sending letters, when deemed complete	None	
4708	Removal from office for neglect of official duty	94-7-401	Official misconduct
4709	Omission to perform duty, when punishable	94-2-102 94-2-105 94-2-106	Voluntary acts Causal relationships between conduct and result Accountability for conduct of another
4710, 4711	Attempts to commit crime punishable	94-4-103	Attempt
4712	Commission of offense while unsuccessfully at- tempting another	94-2-105(2)	Result different than con- templated
4713 to 4715	Repeated offenses	95-1507	Persistent felony offenders
4716, 4717	Repealed in 1967		
4718	Imprisonment for life	None	
4719	Fine added to imprison- ment	None	
4720	Civil rights of convict suspended	95-2227	Effect of conviction
4721	Civil death	None	
4722	Conveyances by convict	95-2227	Effect of conviction
4723	Convict as witness	95-2227	Effect of conviction
4724	Person of convict pro- tected	94-8-113	Mistreating prisoners
4725	Forfeitures	1972 Const., Art. II, Sec. 30 95-2227	Forfeiture of property pro- hibited Effect of conviction
4801	No person punishable but on legal conviction	1972 Const., Art. II, Sec. 17	Due process
4802	Public offenses — how prosecuted	1972 Const., Art. II, Sec. 20	Initiation of prosecutions
4803	Repealed in 1967		



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R.C.M., 1947 Title 94 Old Section	Subject Matter	Montana Criminal Code of 1973	Subject Matter
4804	Parties to a criminal action	95-1503	Parties to a criminal action
4805	Repealed in 1967		
4806	Rights of a defendant in a criminal action	1972 Const., Art. II, Sec. 24	Rights of the accused
4807	Repealed in 1969		
4808	No person to be witness against himself or to be unnecessarily restrained	1972 Const., Art. II, Secs. 21, 22, 23	Bail and detention
4809	No person to be convicted but upon verdict or judgment	1972 Const., Art. II, Sec. 25	Privilege against self-incrimination
4901 to 4917	Repealed in 1967	1972 Const., Art. II, Sec. 26	Trial by jury
5001 to 5004	Lawful resistance	95-1915	Verdict
5005	Persons acting in aid of officers justified	94-3-102	Use of force in defense of person
5101 to 5116	Security to keep the peace	95-609(c)	Assisting a peace officer
5201, 5202	Police in cities and towns —organization and attendance at public meetings	None	
5301	Power of sheriff in overcoming resistance	95-609	Assisting a peace officer
5302	Officer to certify to court the name of resisters, etc.	94-7-302	Obstructing officer
5303	Ordering out militia to aid in executing process	77-107	Governor may order out organized militia
5304	Magistrates and officers to command rioters to disperse	94-8-102	Failure to disperse
5305	Arrest of rioters if they do not disperse	94-8-102 94-8-103	Failure to disperse Riot
5306	Officers who may order out the militia	95-609	Assisting a peace officer
5307	Commanding officer and troops to obey the order	None	
5308 to 5310	Suppression of riots	77-109	Penalty for failure to obey call
5311	Conduct of troops	77-121	Officers to be commissioned by governor
5312, 5313	Governor may declare county in state of insurrection	77-121	Officers to be commissioned by the governor
5314	Liability of officers for neglect of duties concerning unlawful or riotous assembly	95-602	Method of arrest
5401, 5402	Power of impeachment	77-107	Governor may order out organized militia
5403 to 5417	Impeachment proceedings	95-2801, 95-2802	Amended by separate 1973 acts, no other change in text
		95-2803 to 95-2817	No change in text

# CROSS REFERENCE TABLE

R.C.M., 1947 Title 94 Old Section	Subject Matter	Montana Criminal Code of 1973	Subject Matter
5418	Repealed by separate 1973 act		
5419	Impeachment no bar to indictment	95-2819	No change in text
5501 to 5516	Removal of officers other- wise than by impeach- ment	94-7-401	Official misconduct
5601 to 5619	Repealed in 1967		
5701 to 5706	Time of commencing criminal actions	94-1-106 94-1-107	General time limitations Limitations
5801 to 6406	Repealed in 1967		
6407	Repealed in 1961		
6407.1 to 6413	Repealed in 1967		
6414	Presumption of law, etc. need not be stated	95-1503	Form of charge
6415	Judgments, etc., how pleaded	95-1506	Pleading judgment
6416	Private statutes, how pleaded	95-1503	Form of charge
6417	Pleading for libel	95-1503	Form of charge
6418	Pleading for forgery, where instrument has been destroyed or with- held by defendant	95-1503	Form of charge
6419	Pleading for perjury or subornation of perjury	95-1503	Form of charge
6420	Pleading for larceny or embezzlement	95-1503	Form of charge
6421	Pleading for selling, ex- hibiting, etc., lewd and obscene books	None	
6422	Repealed in 1967		
6423	Distinction between ac- cessory before the fact and principal abrogated	94-2-107	When accountability exists
6424	Indictment against ac- cessory	94-2-107 95-404	When accountability exists Where a person in one county commits or aids and abets the commission of an offense in another county
6425	Accessory may be indited and tried, though principal has not been	94-2-108	Separate conviction of per- sons accountable
6426 to 6428	Repealed in 1967		
6429	Allegation as to partner- ship property	95-1503 94-6-306	Form of charge Offender's interest in the property
6430 to 6805	Repealed in 1967		
6806 to 6808	Repealed in 1969		
6808.1 to 6808.5	Double jeopardy	95-1711	Effect of former prosecu- tion
6809 to 7202	Repealed in 1967		
7203	Defendant presumed in- nocent — reasonable doubt	95-2901	No change in text
7204	Reasonable doubt as to degree convicts only of lowest	95-2902	No change in text
7205	Repealed in 1967		

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R.C.M., 1947 Title 94 Old Section	Subject Matter	Montana Criminal Code of 1973	Subject Matter
7206, 7207	Discharging defendant that he may be a witness	95-1504(d), (e)	No change in text
7208	Effect of such discharge	95-1711	Effect of former prosecution and multiple prosecutions
7209	Rules of evidence in civil actions applicable to criminal cases	95-3001	No change in text
7210	Evidence on trial for treason	95-3002	No change in text
7211	Evidence on trial for conspiracy	94-4-102	Evidence for conspiracy
7212	When burden of proof shifts in trial for murder	95-3004(b)	Burden in a homicide trial
7213	All witnesses need not be called	None	
7214	Evidence on trial for bigamy	None	
7215	Evidence on trial for forging bank bills	None	
7216	Evidence on trial for abortion and enticing females for prostitution	None	
7217	Proof of corporation by reputation	None	
7218	Evidence on trial for selling, etc., lottery tickets	None	
7219	Evidence of false pretenses	None	
7220	Conviction on testimony of accomplice	95-3012	Testimony of persons legally accountable
7221 to 7233	Repealed in 1967		
7234	Repealed in 1969		
7235 to 7239	Repealed in 1967		
7240	Evidence in trials for larceny	None	
7301 to 7306	Repealed in 1967		
7307	When discharged without verdict, cause to be tried again	95-1711	Effect of former prosecution
7308 to 7822	Repealed in 1967		
7823	Repealed in 1955		
7824	Repealed in 1967		
7825 to 7830	Repealed in 1955		
7831 to 7841	Repealed in 1967		
7901, 7902	Uniform Act for Out-of-State Parolee Supervision	95-3201, 95-3202	No change in text
8001 to 8507	Repealed in 1967		
8508 to 8510	Guaranteed arrest bond certificates	None	
8601 to 8718	Repealed in 1967		
8801	Who are competent witnesses	95-3010	No change in text
8802	Competency of husband and wife as witnesses	95-3011	No change in text
8803	Defendant as witness	1972 Const., Art. II, Sec. 25	Privilege against self-incrimination



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8804	Testimony of parties to offense	95-1807	Defendant as witness
8901 to 8909	Repealed in 1967		
9001	Definition of terms	95-1808	Definition of terms
9002 to 9004	Witnesses from without state	95-1809 to 95-1811	No change in text
9005 to 9007	Interpretation, short title and repeal	None	
9201 to 9214	Examination of witnesses on commission	95-1802	Depositions
9301 to 9306	Repealed in 1967		
9307	Expense of sending etc., defendant to asylum	95-506(d)	Expense of sending defendant to hospital
9401 to 9707	Repealed in 1967		
9801 to 9820	Repealed in 1955		
9821, 9822	Probation, parole and clemency	95-3203, 95-3204	No change in text
9823	Definition of terms	95-3205	Amended by separate 1973 act, no other change in text
9824 to 9837	Board of pardons and its procedures	95-3206 et seq.	Miscellaneous amendments and repeals
9838	Return of parole violator	95-3308	Amended
9839, 9840	Parolees' terms of service	95-3221, 95-3222	No change in text
9841, 9842	Executive clemency applications	95-3223, 95-3224	Amended by separate 1973 act, no other change in text
9843 to 9845	Hearings on executive clemency	95-3225 to 95-3227	No change in text
9846	Notice of hearings	95-3228	Minor changes in text
9847 to 9851	Decisions on executive clemency	95-3229 to 95-3233	No change in text
9901 to 9908	Bastardy proceedings	61-301 to 61-327	Uniform Parentage Act
100-1 to 301-21	Repealed in 1967		
401-1 to 401-3	Reward for apprehension of convicts and felons	None	
501-1 to 501-32	Uniform Criminal Extradition Act	95-3101 to 95-3130	Uniform Criminal Extradition Act
601-1 to 601-3	Repealed in 1967		
701-1	Bringing prisoner into court	95-1812	No change in text
801-1, 801-2	Fines and forfeitures, disposition	95-2228, 95-2229	Fines and forfeitures, disposition
901-1 to 901-18	Repealed in 1961		
1001-1 to 1001-11	Criminal law study commission	None	
1101-1 to 1101-6	Interstate Agreement on Detainers	95-3131 to 95-3136	No change in text

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# REVISED CODES OF MONTANA

VOLUME 8  
1977 Cumulative Supplement

*Containing*

AMENDMENTS TO ACTS AND NEW LAWS ENACTED BY THE  
LEGISLATIVE ASSEMBLY SINCE PUBLICATION OF  
REPLACEMENT VOLUME 8 OF THE  
1947 REVISED CODES

AND

ANNOTATIONS SUPPLEMENTING REPLACEMENT VOLUME 8  
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# MONTANA REVISED CODES

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## **TITLE 94—CRIMES AND CRIMINAL PROCEDURE**

Chapter 513, Laws of 1973, created the Montana Criminal Code of 1973 which completely replaces the original Title 94 of the Revised Codes of Montana as heretofore amended.

All of Title 94, the Montana Criminal Code of 1973, including supplementary materials through the 1977 Session of the Legislature is published in a separate special supplement.

A Cross Reference Table, appearing in the special pamphlet beginning on page 169, shows, for each section of old Title 94, either the place to which the new section has been transferred by renumbering or the sections, either in new Title 94 or other titles of the Revised Codes, which cover the same subject matter.

Also included in the separate pamphlet edition are Source Notes and Commission Comments on the various sections of the new Criminal Code, and a special Index, beginning on page 200.



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## CHAPTER 1—SCOPE, PURPOSE, CONSTRUCTION AND RULES

### Section

95-101. Application.

**95-101. Application.** This title shall govern the procedure in all the courts of Montana in all criminal proceedings except where provision for a different procedure is specifically provided by law.

**History:** En. 95-101 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 184, L. 1977.

#### Amendments

The 1977 amendment made minor changes in phraseology.

#### Applicability

In view of the limited nature of proceedings and the lack of legal expertise on the part of the commissioners, the provisions of this title do not govern police commission hearings. *Steer v. City of Missoula*, — M —, 547 P 2d 843.

### 95-103 to 95-108. Repealed.

#### Repeal

Sections 95-103 to 95-108 (Secs. 1 to 6, Ch. 193, L. 1967), relating to adoption of

rules of criminal procedure, were repealed by Sec. 64, Ch. 184, Laws 1977.



## CHAPTER 2—DEFINITIONS

**95-206. Judge.****Justice of the Peace Courts**

Since, by virtue of section 95-2009, a defendant tried in a justice of the peace court is provided with the right to a trial de novo, the word "judge" in section 95-1709 does not include "justice of the peace" and a justice of the peace may not be disqualified on a simple affidavit for substitution of judge under section 95-1709, rather the provisions of chapter 95-20 must be followed. *Bailey v. State*, — M —, 517 P 2d 708.

**Police Magistrate**

Police courts are courts of limited jurisdiction and have only such authority as is expressly conferred upon them, which does not include authority to issue search warrants. *State v. Tropsf*, — M —, 530 P 2d 1158.

**Search Warrant**

Unlike a police magistrate, a justice of the peace is included within the term "any judge" in section 95-704 for the purpose of issuing search warrants. *State v. Snider*, — M —, 541 P 2d 1204.

**95-210. Peace officer.****Cross-References**

Certain employees of state highway commission as peace officers, secs. 32-1631.1 to 32-1641.

Members of Montana university system security department as peace officers, sec. 75-8513.

## CHAPTER 3—JURISDICTION

**Section**

- 95-302. Jurisdiction of the justice of the peace courts.  
95-302.1. Jurisdiction of justices' courts.

**95-302. Jurisdiction of the justice of the peace courts.** The justices' courts have:

(a) Jurisdiction of all misdemeanors punishable by a fine not exceeding \$500.00 or imprisonment not exceeding 6 months, or both such fine and imprisonment, and of all violations of fish and game statutes punishable by a fine of not more than \$1,000 or imprisonment for not more than 6 months, or both; excluding jurisdiction in cases commenced under the Montana Dangerous Drug Act except to act as examining and committing courts and to conduct preliminary hearings as provided in subsection (c).

(b) Concurrent jurisdiction, with district courts, of all misdemeanors punishable by a fine only, not exceeding \$1,500.00; and

(c) Jurisdiction to act as examining and committing courts and for such purpose to conduct preliminary hearings.

**History:** En. 95-302 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 11, Ch. 314, L. 1969; amd. Sec. 6, Ch. 465, L. 1977.

**Amendments**

The 1977 amendment inserted "and of all violations \* \* \* not more than 6 months, or both" in subdivision (a); and made minor changes in style.

**Constitutionality of Conviction Before Lay Judge**

Kentucky's court system, which vested jurisdiction of penal and misdemeanor cases punishable by a fine of up to \$500

and/or one year's imprisonment concurrently in police and circuit courts, provided that while police court judges in first and second class cities must be members of the bar they need not be in smaller cities, and required a trial de novo in the circuit court upon any appeal from a police court judgment, did not violate either the equal protection or due process clause of the fourteenth amendment, and defendant convicted in police court before a lay judge of driving while intoxicated was not deprived of any constitutional rights, even though the judge improperly denied his request for a jury trial and imposed a

sentence not authorized by law, since all such errors could be cured in a trial de novo. *North v. Russell*, — US —, — L Ed 2d —, 96 S Ct 2709.

#### Search Warrants

A legislative intent to include the power

to issue search warrants within the grant of jurisdiction to justices to act as examining courts is apparent from legislative history coupled with Montana's existing judicial structure. *State v. Snider*, — M —, 541 P 2d 1204.

**95-302.1. Jurisdiction of justices' courts.** The justices' courts have criminal jurisdiction as authorized by 93-410 and 95-302.

**History:** En. 95-302.1 by Sec. 2, Ch. 184, L. 1977.

#### Title of Act

An act to generally revise and clarify the laws relating to criminal procedure.

## CHAPTER 4—VENUE

#### Section

95-408. Stolen property.

### 95-402. Where offense committed partly in one, etc.

#### Act Committed in County

Where defendants, while in Missoula County jail awaiting trial on charges pending in Powell County, were charged in counts added to the information already filed in Powell County with conspiracy and solicitation to commit perjury, tampering with witnesses and fabrication of physical evidence all in connection with the previously filed charges, the additional crimes charged were interrelated with and dependent upon the pendency of the other charges, thus one of the acts necessary to their commission occurred in Powell Coun-

ty, and it was error for the District Court there to order venue on the additional counts changed to Missoula County. *State v. Bretz*, — M —, 548 P 2d 949.

#### Multiple Offenses

Action against defendant, who was charged with 52 offenses committed in several counties, was properly venued in the county where the information was filed, even though elements of some of the offenses may have occurred in another county. *State v. Bretz*, — M —, 534 P 2d 496.

**95-408. Stolen property.** When a person obtains property by theft, robbery, or deceptive practices, he may be tried in any county in which he exerted control over such property.

**History:** En. 95-408 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 71, Ch. 359, L. 1977.

#### Amendments

The 1977 amendment substituted "theft, robbery, or deceptive practices" for "larceny, robbery, false pretenses or embezzlement"; and made a minor change in phraseology.

#### Offenses in Several Counties

Defendant who was charged with 52 offenses committed in several different counties, any one of which counties would have been proper venue for trial, was not entitled to change of venue, since complaint was filed in a county of proper venue and no evidence of prejudice or other legal reason was shown as a basis for granting the change of venue. *State v. Bretz*, — M —, 534 P 2d 496.

## CHAPTER 5—COMPETENCY OF ACCUSED

#### Section

95-501. Mental disease or defect excluding responsibility.

95-505. Psychiatric examination of defendant with respect to mental disease or defect.

95-506. Determination of fitness to proceed—effect of finding of unfitness—proceedings if fitness is regained.

95-507. Determination of irresponsibility on basis of report—examination by psychiatrist chosen by state or defendant—psychiatric testimony upon trial.

- 95-508. Legal effect of acquittal on the ground of mental disease or defect excluding responsibility—commitment—release or discharge.  
 95-509. Admissibility of statements made during examination or treatment.

**95-501. Mental disease or defect excluding responsibility.** (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he is unable either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

(2) As used in this chapter, the term "mental disease or defect" does not include an abnormality manifested only by repeated criminal or other antisocial conduct.

**History:** En. 95-501 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 3, Ch. 184, L. 1977.

#### **Amendments**

The 1977 amendment made minor changes in phraseology and style.

#### **M'Naughten and Irresistible Impulse Rules Abandoned**

The M'Naughten and "irresistible impulse" rules no longer apply, having been supplanted by the definition of criminal irresponsibility in subsection (a); the definition in subsection (a) is the same as that adopted by the American Law Institute in Article IV, Section 4.01 of the Model Penal Code except that Montana legislature substituted "is unable" for "lacks substantial capacity"; by that change the legislature intended to impose a stricter test for mental incapacity

than that contemplated by the Model Penal Code. *State ex rel. Krutzfeldt v. District Court, Thirteenth Judicial Dist., Yellowstone County*, — M —, 515 P 2d 1312.

#### **Release after Acquittal for Mental Disease**

Defendant's motion for acquittal should have been granted where the uncontradicted testimony of doctor, based on examination, testing, and observation over a period of several years was to the effect that defendant had been unable to conform his conduct to the law at the time of the crime; however, entry of acquittal does not allow defendant to be released from mental institution until determination by district judge that defendant is no longer dangerous. *State ex rel. Main v. District Court*, — M —, 525 P 2d 28.

#### **95-503. Mental disease or defect excluding responsibility, etc.**

##### **Burden of Proof**

State was not obliged to present proof

of defendant's sanity in rape prosecution. *State v. Olson*, 156 M 339, 480 P 2d 822.

**95-505. Psychiatric examination of defendant with respect to mental disease or defect.** (1) When the defendant has filed a notice of intention to rely on the defense of mental disease or defect excluding responsibility, or there is reason to doubt his fitness to proceed, or reason to believe that mental disease or defect of the defendant will otherwise become an issue in the cause, the court shall appoint at least one (1) qualified psychiatrist or shall request the superintendent of Warm Springs state hospital to designate at least one (1) qualified psychiatrist, which designation may be or include himself, to examine and report upon the mental condition of the defendant. The court may order the defendant to be committed to a hospital or other suitable facility for the purpose of the examination for a period of not exceeding sixty (60) days or such longer period as the court determines to be necessary for the purpose, and may direct that a qualified psychiatrist retained by the defendant be permitted to witness and participate in the examination.

(2) In the examination any method may be employed which is accepted by the medical profession for the examination of those alleged to be suffering from mental disease or defect.



(3) The report of the examination shall include the following:

(a) A description of the nature of the examination;

(b) A diagnosis of the mental condition of the defendant;

(c) If the defendant suffers from a mental disease or defect, an opinion as to his capacity to understand the proceedings against him and to assist in his own defense;

(d) When a notice of intention to rely on the defense of irresponsibility has been filed, an opinion as to the ability of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law at the time of the criminal conduct charged; and

(e) When directed by the court, an opinion as to the capacity of the defendant to have a particular state of mind which is an element of the offense charged.

(4) If the examination cannot be conducted by reason of the unwillingness of the defendant to participate therein, the report shall so state and shall include, if possible, an opinion as to whether the unwillingness of the defendant was the result of mental disease or defect.

(5) The report of the examination shall be filed (in triplicate) with the clerk of court, who shall deliver copies to the county attorney and to counsel for the defendant.

**History:** En. 95-505 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 88, Ch. 120, L. 1974.

#### Amendments

The 1974 amendment substituted "Warm Springs state hospital" in the first sentence of subsection (1) for "Montana state hospital"; and made minor changes in phraseology, punctuation and style.

#### Acquittal Denied

Report of psychiatrist from state hospital finding no mental disease or defect precludes the granting of a pretrial acquittal. *State v. French*, — M —, 531 P 2d 373.

**95-506. Determination of fitness to proceed—effect of finding of unfitness—proceedings if fitness is regained.** (1) When the defendant's fitness to proceed is drawn in question, the issue shall be determined by the court. If neither the county attorney nor counsel for the defendant contests the finding of the report filed under section 95-505, the court may make the determination on the basis of the report. If the finding is contested, the court shall hold a hearing on the issue. If the report is received in evidence upon the hearing, the parties have the right to summon and cross-examine the psychiatrists who joined in the report and to offer evidence upon the issue.

(2) If the court determines that the defendant lacks fitness to proceed, the proceeding against him shall be suspended, except as provided in subsection (3) of this section, and the court shall commit him to the custody of the director of the department of institutions, to be placed in an appropriate institution of the department of institutions for so long as the unfitness endures. When the court, on its own motion or upon the application of the director of the department of institutions, or the county attorney, or the defendant or his legal representative, determines, after a hearing if a hearing is requested, that the defendant has regained fitness to proceed, the proceeding shall be resumed. If, however, the court is

of the view that so much time has elapsed since the commitment of the defendant that it would be unjust to resume the criminal proceedings, the court may dismiss the charge and may order the defendant to be discharged, or, subject to the law governing the civil commitment of persons suffering from mental disease or defect, order the defendant committed to an appropriate institution of the department of institutions.

(3) If the court determines that the defendant lacks fitness to proceed due to the fact that the person is developmentally disabled as defined by 38-1202, the proceeding against him shall be suspended, except as provided in subsection (4) of this section, and the court shall proceed to secure treatment as provided in Title 38, chapter 12, or Title 38, chapter 13.

(4) The fact that the defendant is unfit to proceed does not preclude any legal objection to the prosecution which is susceptible to fair determination prior to trial and without the personal participation of the defendant.

(5) The expenses of sending the defendant to the custody of the director of the department of institutions, to be placed in an appropriate institution of the state department of institutions, of keeping him there, and of bringing him back, are in the first instance chargeable to the county in which the indictment was found, or the information filed; but the county may recover them from the estate of the defendant, if he has any, or from a town, city or county bound to provide for and maintain him elsewhere.

**History:** En. 95-506 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 3, Ch. 513, L. 1973; amd. Sec. 89, Ch. 120, L. 1974; amd. Sec. 6, Ch. 568, L. 1977.

#### **Amendments**

The 1973 amendment added subsection (4).

The 1974 amendment substituted "Warm Springs state hospital" for "Montana state hospital" in subsection (2); substituted "department of institutions" for "state

department of public institutions" in subsection (2); deleted "public" before "institutions" in subsection (4); and made minor changes in phraseology, punctuation and style.

The 1977 amendment substituted "director of the department of institutions" in three places for "superintendent of Warm Springs state hospital"; inserted subsection (3); and redesignated former subsections (3) and (4) as subsections (4) and (5).

**95-507. Determination of irresponsibility on basis of report—examination by psychiatrist chosen by state or defendant—psychiatric testimony upon trial.** (1) If the report filed under 95-505 finds that the defendant at the time of the criminal conduct charged suffered from a mental disease or defect which rendered him unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law and the court, after a hearing if a hearing is requested by the attorney prosecuting or the defendant, is satisfied that the mental disease or defect was sufficient to exclude responsibility, the court on motion of the defendant shall enter judgment of acquittal on the ground of mental disease or defect excluding responsibility.

(2) If either the defendant or the state wishes the defendant to be examined by a qualified psychiatrist or other expert selected by the one proposing the examination, the examiner shall be permitted to have reasonable access to the defendant for the purpose of the examination.



(3) Upon the trial, any psychiatrist who reported under 95-505 may be called as a witness by the prosecution or by the defense. If the issue is being tried before a jury, the jury may not be informed that the psychiatrist was designated by the court or by the superintendent of Warm Springs state hospital. Both the prosecution and the defense may summon any other qualified psychiatrist or other expert to testify, but no one who has not examined the defendant is competent to testify to an expert opinion with respect to the mental condition or responsibility of the defendant, as distinguished from the validity of the procedure followed by or the general scientific propositions stated by another witness.

(4) When a psychiatrist or other expert who has examined the defendant testifies concerning the defendant's mental condition, he may make a statement as to the nature of his examination, his diagnosis of the mental condition of the defendant at the time of the commission of the offense charged, and his opinion as to the ability of the defendant to appreciate the criminality of his conduct, to conform his conduct to the requirements of law, or to have a particular state of mind which is an element of the offense charged. The expert may make any explanation reasonably serving to clarify his diagnosis and opinion and may be cross-examined as to any matter bearing on his competency or credibility or the validity of his diagnosis or opinion.

**History:** En. 95-507 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 90, Ch. 120, L. 1974; amd. Sec. 4, Ch. 184, L. 1977.

#### **Amendments**

The 1974 amendment substituted "Warm Springs state hospital" for "Montana state hospital" in subsection (3); and made minor changes in phraseology, punctuation and style.

The 1977 amendment made minor changes in phraseology, punctuation and style.

#### **Release after Acquittal for Mental Disease**

Defendant's motion for acquittal should have been granted where the uncontradicted testimony of doctor, based on examination, testing, and observation over a period of several years was to the effect that defendant had been unable to conform his conduct to the law at the time of the crime; however, entry of acquittal does not allow defendant to be released from

mental institution until determination by district judge that defendant is no longer dangerous. State ex rel. Main v. District Court, — M —, 525 P 2d 28.

#### **Severance of Trial on Sanity**

Denial of defendant's motion for severance for trial of the issues of defendant's guilt or innocence and his sanity was proper since this section and section 95-508 provide for those matters to be presented at same trial and to same jury. State v. Olson, 156 M 339, 480 P 2d 822, explained in — M —, 515 P 2d 1315.

#### **Trial of Issue of Sanity to both Court and Jury**

Defendant who elected to try issue of sanity to trial judge alone was not, after unfavorable finding by court, foreclosed from presenting defense of insanity to the jury. State ex rel. Krutzfeldt v. District Court, Thirteenth Judicial Dist., Yellowstone County, — M —, 515 P 2d 1312.

**95-508. Legal effect of acquittal on the ground of mental disease or defect excluding responsibility—commitment—release or discharge.** (1) When a defendant is acquitted on the ground of mental disease or defect excluding responsibility, the court shall order him committed to the custody of the superintendent of Warm Springs state hospital to be placed in an appropriate institution for custody, care, and treatment. A person so confined shall have a hearing, unless waived, within fifty (50) days of his confinement to determine his present mental condition and whether he may be discharged or released without danger to others. The court



shall cause notice of the hearing to be served upon the person, his counsel and the prosecuting attorney. Such a hearing shall be deemed a civil proceeding and the burden shall be upon the defendant to prove by a preponderance of the evidence that he may be safely released. According to the determination of the court upon the hearing, the defendant shall be discharged or released on such conditions as the court determines to be necessary, or shall be committed to the custody of the superintendent of the Montana state hospital to be placed in an appropriate institution for custody, care and treatment.

(2) If the superintendent of Warm Springs state hospital believes that a person committed to his custody, under subsection (1) of this section, may be discharged or released on condition without danger to himself or others, he shall make application for the discharge or release of the person in a report to the court by which the person was committed, and shall send a copy of the application and report to the county attorney of the county from which the defendant was committed. The court shall then appoint at least two (2) qualified psychiatrists to examine the person and to report within sixty (60) days, or a longer period which the court determines to be necessary for the purpose, their opinion as to his mental condition. To facilitate the examinations and the proceedings thereon, the court may have the person confined in any institution located near the place where the court sits, which may hereafter be designated by the superintendent of Warm Springs state hospital as suitable for the temporary detention of irresponsible persons.

(3) If the court is satisfied by the report filed under subsection (2) of this section, and the testimony of the reporting psychiatrists which the court considers necessary that the committed person may be discharged or released on condition without danger to himself or others, the court shall order his discharge or his release on conditions which the court determines to be necessary. If the court is not satisfied, it shall promptly order a hearing to determine whether the person may safely be discharged or released. A hearing is considered a civil proceeding and the burden is upon the committed person to prove by a preponderance of the evidence that he may safely be discharged or released. According to the determination of the court upon the hearing, the committed person shall then be discharged or released on conditions which the court determines to be necessary, or shall be recommitted to the custody of the superintendent of Warm Springs state hospital, subject to discharge or release only in accordance with the procedure prescribed above in subsections (2) and (3).

(4) If, within five (5) years after the conditional release of a committed person, the court determines, after hearing evidence, that the conditions of release have not been fulfilled and that for the safety of the person or for the safety of others his conditional release should be revoked, the court shall immediately order him to be recommitted to the superintendent of Warm Springs state hospital, subject to discharge or release only in accordance with the procedure prescribed above in subsections (2) and (3).

(5) A committed person may make application for his discharge or release to the court by which he was committed, and the procedure to be

followed upon the application is the same as that prescribed above in the case of an application by the superintendent of Warm Springs state hospital. However, an application by a committed person need not be considered until he has been confined for a period of not less than six (6) months from the date of the order of commitment, and if the determination of the court is adverse to the application, the person shall not be permitted to file a further application until one (1) year has elapsed from the date of any preceding hearing on an application for his release or discharge.

**History:** En. 95-508 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 210, L. 1973; amd. Sec. 91, Ch. 120, L. 1974.

made minor changes in phraseology, punctuation and style.

#### Amendments

The 1973 amendment added the second, third, fourth and fifth sentences to subsection (1); inserted "by a preponderance of the evidence" in the fourth sentence of subsection (3); and substituted "in subsections (2) and (3)" for "for a first hearing" at the end of subsections (3) and (4).

The 1974 amendment substituted "Warm Springs state hospital" for "Montana state hospital" throughout the section; and

#### Release after Acquittal

Person acquitted of a crime on the grounds of mental disease or defect may later be released from commitment in the state hospital only if the release is recommended both by the hospital superintendent and also by the district judge after hearing and determination beyond a reasonable doubt that the person committed will not be dangerous in the foreseeable future. State ex rel. Main v. District Court, — M —, 525 P 2d 28.

### DECISIONS UNDER FORMER LAW

#### Burden of Proof

For release of persons committed to state hospital under this section it must be established by evidence convincing beyond a reasonable doubt that release can be effected without danger to the public. State v. Taylor, 158 M 323, 491 P 2d 877, certiorari denied in 406 US 978.

#### Psychiatrists' Statement

Habeas corpus petition by person committed under this section requires statement by two psychiatrists before it may be considered. Petition of Brown, 159 M 550, 497 P 2d 1038 (Decision prior to 1973 amendment).

**95-509. Admissibility of statements made during examination or treatment.** A statement made for the purposes of psychiatric examination or treatment provided for in this chapter by a person subjected to such examination or treatment is not admissible in evidence against him in any criminal proceeding on any issue other than that of his mental condition. It is admissible on the issue of his mental condition, whether or not it would otherwise be considered a privileged communication, unless it constitutes an admission of guilt of the crime charged.

**History:** En. 95-509 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 5, Ch. 184, L. 1977.

#### Amendments

The 1977 amendment rewrote this section. For prior version, see parent volume.

### CHAPTER 6—ARREST

#### Section

- 95-603. Issuance and service of arrest warrant upon complaint.
- 95-609. Assisting a peace officer.
- 95-611. Arrest by a private person.
- 95-611.1. Definitions.
- 95-611.2. Concealment not proof of theft.
- 95-618. Roadblocks.

**95-603. Issuance and service of arrest warrant upon complaint.** (1) A complaint, as the basis of an arrest warrant, shall be in writing.

(2) When a complaint is presented to a court charging a person with the commission of an offense, the court shall examine upon oath the complainant and may also examine any witnesses.

(3) If it appears from the contents of the complaint and the examination of the complainant and other witnesses, if any, that there is probable cause to believe that the person against whom the complaint was made has committed an offense, a warrant shall be issued by the court for the arrest of the person complained against. The court, in its discretion, may issue a summons instead of a warrant. Upon the request of the county attorney, the court shall issue a summons instead of a warrant. More than one warrant or summons may issue on the same complaint.

(4) A warrant of arrest shall:

(a) be in writing in the name of the state of Montana or in the name of a municipality if a violation of a municipal ordinance is charged;

(b) set forth the nature of the offense;

(c) command that the person against whom the complaint was made be arrested and brought before the court issuing the warrant or, if the judge is absent or unable to act, before the nearest or most accessible court in the same county or the adjoining county. If an arrest is made in a county other than the one in which the warrant was issued the arrested person shall be taken without unnecessary delay before the nearest and most accessible judge in the county where the arrest was made or the adjoining county.

(d) specify the name of the person to be arrested or, if his name is unknown, designate the person by any name or description by which he can be identified with reasonable certainty;

(e) state the date when issued and the municipality or county where issued; and

(f) be signed by the judge of the court with the title of his office.

(5) The warrant of arrest may specify the amount of bail.

(6) The warrant shall be directed to all peace officers in the state. It shall be executed by a peace officer and may be executed in any county of the state. However, warrants issued for the violation of city ordinances cannot be executed outside the city limits, except as otherwise provided by 11-927 and 11-960.

**History:** En. 95-603 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 6, Ch. 184, L. 1977.

#### **Amendments**

The 1977 amendment added "or the adjoining county" to the first and second sentences of subdivision (4)(c); and made minor changes in phraseology, punctuation and style.

#### **Examination before Issuing Warrant**

Arrest warrant was invalid and subse-

quent search and seizure unlawful where complaint of deputy county attorney, under oath, disclosed nothing more than conclusion that defendant sold quantity of marijuana to undercover narcotics agent, complainant was not examined under oath, and undercover agent could not say that he had purchased from defendant. *State ex rel. Wicks v. District Court*, 159 M 434, 498 P 2d 1202, distinguished in 507 P 2d 1055, 1056.



**95-606. Arrest without a warrant.****Validity of Warrantless Arrest**

A warrantless arrest was valid under section 95-608(d) where detectives smelled burning marijuana emanating from the open doorway to an apartment, where upon entering the apartment police officers saw a clear plastic bag of marijuana and a

burned marijuana stub, where probable cause was supported by information from reliable informants concerning previous drug activity in the apartment, and the building owner had informed the police of possible drug use. *State v. Bennett*, 158 M 496, 493 P 2d 1077.

**95-608. Arrest by a peace officer.****Probable Cause**

Probable cause existed for arrest on dangerous drug charges of three persons who were present and lived in house where drugs were found; but probable cause did not exist concerning fourth party who was present on premises but did not live there, notwithstanding later finding of drugs on such party, since mere presence in place was insufficient to justify arrest. *State ex rel. Glantz v. District Court*, 154 M 132, 461 P 2d 193.

The mere presence of the defendant's car in the area, footprints in the general vicinity, and the fact that defendant missed work was not sufficient to constitute probable cause for his arrest without a warrant for malicious trespass. *State v. Fetters*, — M —, 526 P 2d 122.

**Reasonable Grounds**

Defendant's arrest was based on reasonable grounds required by subsection (d) of this section where an informer had indicated a "pot party" was in progress, defendant was a guest at the party and a participant therein, and the aroma of burning or burnt marijuana was emanating from the premises, all of which was

known to the officers prior to their entry, arrest and search. *State v. Hull*, 158 M 6, 487 P 2d 1314.

A warrantless arrest was valid under subdivision (d) of this section where detectives smelled burning marijuana emanating from the open doorway to an apartment, saw a clear plastic bag of marijuana and a burned marijuana stub upon entering the apartment, where probable cause was supported by information from reliable informants concerning previous drug activity in the apartment, and the building owner had informed the police of possible drug use. *State v. Bennett*, 158 M 496, 493 P 2d 1077.

"Reasonable grounds" and "probable cause" are synonymous. *State v. Fetters*, — M —, 526 P 2d 122.

Where defendant was arrested for sale of dangerous drugs based on information supplied by informant not known to police to be reliable, there was probable cause for arrest, since informant, following his own arrest, made statements against interest in disclosing he was accomplice in sale of dangerous drugs. *State ex rel. Goulding v. District Court*, — M —, 538 P 2d 18.

**95-609. Assisting a peace officer.** (a) A peace officer making a lawful arrest may command the aid of persons eighteen (18) years of age or older.

(b) and (c) \* \* \* [Same as parent volume.]

**History:** En. 95-609 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 60, Ch. 535, L. 1975.

**Amendments**

The 1975 amendment deleted "male" be-

fore "persons" in subsection (a); and substituted "eighteen (18) years of age or older" for "over the age of eighteen (18)" in subsection (a).

**95-611. Arrest by a private person.** A private person may arrest another when:

(1) he believes, on reasonable grounds, that an offense is being committed or attempted in his presence;

(2) a felony has in fact been committed and he believes, on reasonable grounds, that the person arrested has committed it; or

(3) he is a merchant, as defined in section 64-212, and has probable cause to believe the other is shoplifting in the merchant's store. Such merchant may stop and temporarily detain the suspected shoplifter; the merchant in such event:

(a) shall promptly inform the person that the stop is for investigation of shoplifting, and that upon completion of the investigation the person will be released or turned over to the custody of a peace officer;

(b) may demand of the person his name and his present or last address and may question the person in a reasonable manner for the purpose of ascertaining whether or not such person is guilty of shoplifting;

(c) may take into possession any merchandise for which the purchase price has not been paid and which is in the possession of the person or has been concealed from full view; and

(d) may place the person under arrest or request the person to remain on the premises until a peace officer arrives.

Any stop, detention, questioning or recovery of merchandise under this subsection shall be done in a reasonable manner and time. Unless evidence of concealment is obvious and apparent to the merchant this section shall not authorize a search of the detained person other than a search of his coat or other outer garments and any package, brief case or other container unless the search is done by a peace officer under proper legal authority. After the purpose of a stop has been accomplished or thirty (30) minutes have elapsed, whichever occurs first, the merchant shall allow the person to go unless the person is arrested and turned over to the custody of a police officer.

(4) Such stop and temporary detention, with or without questioning or removal of merchandise, when done by a merchant in compliance with the law, shall not constitute an unlawful arrest or search. A merchant stopping, detaining, or arresting a person on the belief that such person is shoplifting, is not liable for damages to such person unless the merchant acts with malice either actual or implied or contrary to the provisions of this law.

**History:** En. 95-611 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 3, Ch. 274, L. 1974.

#### **Amendments**

The 1974 amendment added subdivisions (3) and (4) and made minor changes in phraseology, punctuation and style.

#### **95-611.1. Definitions. As used in this act:**

(1) "Concealment" means any act or deception done purposely or knowingly upon or outside the premises of a wholesale or retail store or other mercantile establishment with the intent to deprive the merchant of all or part of the value of the merchandise. The following acts or deceptive conduct shall be prima facie evidence of concealment: concealing merchandise upon the person, or in a container, or otherwise removing such merchandise from full view while upon the premises; or removing, changing, or altering any price tag; or transferring or moving any merchandise upon the premises to obtain a lower price than the merchandise was offered for sale by the merchant; or abandoning or disposing of any merchandise in such a manner that the merchant will be deprived of all or part of the value of the merchandise.

(2) "Shoplifting" means the theft of any goods offered for sale by a wholesale or retail store or other mercantile establishment.

**History:** En. 95-611.1 by Sec. 1, Ch. 274, L. 1974.

**Title of Act**

An act defining shoplifting as theft;

amending sections 95-611 and 11-1602, R. C. M. 1947, expanding a citizen's right to detain and arrest offenders and limiting civil actions based on such detentions and arrests.

**95-611.2. Concealment not proof of theft.** Concealment of merchandise shall not constitute proof of the commission of the offense of theft.

**History:** En. 95-611.2 by Sec. 2, Ch. 274, L. 1974.

**95-618. Roadblocks.** (a) \* \* \* [Same as parent volume.]

(b) Authority to Establish Roadblocks. The duly elected or appointed law-enforcement officers of this state, and their deputies, are hereby authorized to establish, in their respective jurisdictions, or in other jurisdictions within the state, temporary roadblocks on the highways of this state for the purpose of identifying drivers, checking for driver's licenses, and apprehending persons wanted for violation of the laws of this state, or of any other state, or of the United States, who are using the highways of this state.

(c) to (e) \* \* \* [Same as parent volume.]

**History:** En. 95-618 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 18, L. 1971.

**Amendments**

The 1971 amendment inserted "checking for driver's licenses" in subsection (b).

## CHAPTER 7—SEARCH AND SEIZURE

**Section**

- 95-704. Grounds for search warrant.
- 95-719. Stop and frisk.
- 95-720. Investigative subpoena.
- 95-721. Conduct of investigative inquiry.
- 95-722. Self-incrimination and immunity.
- 95-723. Applicability of other laws—costs.

### 95-701. Searches and seizures—when authorized.

**Consent**

Where defendant in first-degree murder prosecution had taken sheriff to his house and turned over alleged murder weapon to sheriff, such action did not constitute an illegal search and seizure since defendant voluntarily consented to turning over rifle. *State v. Williams*, 153 M 262, 455 P 2d 634.

Where appellant, convicted on charge of robbery, had been given three Miranda warnings during course of investigation, evidence obtained from appellant's apartment after he gave consent to police to go there was not the product of an unlawful search and seizure and therefore its admission was not error, notwithstanding that no warrant was issued for such search. *State v. Braden*, 154 M 90, 460 P 2d 85.

Defendant's consent to the search of his car was voluntary even though he had

spent the night in jail and was still in custody, where defendant had previously been arrested and knew his rights and had told officers that his car was full of marijuana and knew that a search warrant would be issued. *State ex rel. Kotwicki v. District Court*, — M —, 532 P 2d 694.

**Lawful Inspection**

Sheriff who was called to search for prowler was justified under subsection (d) of this section in seizing items in plain view during such search. *State v. Gallagher*, — M —, 509 P 2d 852.

**Liability of Sheriff**

The action of a police officer proceeding on the basis of his reasonable, good faith understanding of the law cannot be tortious, and where the sheriff has made an arrest pursuant to evidence discovered under authority of a search warrant that was



valid on its face, the arrested person cannot recover for false arrest or imprisonment, even though the search warrant is later declared to be invalid by the court. *Strung v. Anderson*, — M —, 529 P 2d 1380.

#### Prior Justification

Police officers who, acting upon suspicion that defendant was a runaway juvenile, had taken defendant to the sheriff's office for the purpose of identifying her and contacting her parents, were without sufficient justification for searching defendant's purse for identification where defendant had produced two items of identification and had informed officers that she had a birth certificate at her home which would substantiate the identification; marijuana and hashish found in search of defendant's purse was excluded since there was no valid reason for the officer's presence in defendant's purse and the "plain view" doctrine was not applicable. *State v. Hough*, — M —, 516 P 2d 613.

### 95-702. Scope of search without warrant.

#### Probable Cause

Although reasonable search without warrant is permitted incident to lawful arrest, the search cannot be used to establish the probable cause which justifies the arrest. *State v. Fetters*, — M —, 526 P 2d 122.

### 95-703. Search warrant defined.

#### "In the Name of the State"

In all criminal matters and particularly in matters that pertain to search warrants, notice to the person subject to the process, stating the name of the court and to whom he may address his grievances, is a matter of substantive due process, and although the warrant is issued in the name of the state, omission or error regarding the name of the court is an infringement of rights and is prejudicial error. *State v. Tropf*, — M —, 530 P 2d 1158.

#### Sufficient Description of Premises To Be Searched

Search warrant which described the premises to be searched as "two cabins located near the Duck Creek 'Y', near west Yellowstone, Montana, near the office building at Koelzer's Duck Creek cabins" was of insufficient particularity where there were three cabins in the area of the office building and where police had good reason to believe that only one of the houses contained controlled sub-

#### Search by Private Citizen

Exclusionary rule of evidence must apply to all searches and seizures, especially where there is also violation of defendant's protection against self-incrimination, and thus motion to suppress evidence was properly granted where employer removed marijuana from defendant's coat in a search without warrant. *State v. Coburn*, — M —, 530 P 2d 442.

#### Search Without Warrant

Police officers who had been given description of automobile and its occupants who were suspected of having recently robbed a pharmacy had probable cause to believe the vehicle was carrying stolen property, and evidence obtained in search of automobile without warrant was admissible. *State v. Spielmann*, 163 M 199, 516 P 2d 617, distinguished in — M —, 520 P 2d 773.

#### Reasonable Search

Action of police officer was reasonable in searching the automobile of defendant who was arrested while driving under the influence and a marijuana cigarette and a bag of marijuana found in the automobile were admissible in evidence. *State v. Turner*, — M —, 523 P 2d 1386.

stances. *State v. Ballew*, — M —, 516 P 2d 1159.

#### To Whom Warrant Directed

Search warrant erroneously directed to judge was defective since judge is not a peace officer. *State ex rel. Stief v. Sande*, — M —, 540 P 2d 968.

Where the same officer applied for the warrant and executed it, the fact that it was directed "to any peace officer of this state" was not a fatal defect since no prejudice resulted to the defendant; but the court again condemned the practice of issuing search warrants to any peace officer. *State v. Snider*, — M —, 541 P 2d 1204, see also *State ex rel. Sanford v. District Court*, below.

A search warrant directed "to any peace officer of this state" was invalid and evidence obtained under it was suppressed. *State ex rel. Sanford v. District Court*, — M —, 551 P 2d 1005.

**95-704. Grounds for search warrant.** Any judge may issue a search warrant upon the written application of any person, made under oath or affirmation before the judge, which:

- (1) states that an offense has been committed;
- (2) states facts sufficient to show probable cause for issuance of the warrant;
- (3) particularly describes the place or things to be searched; and
- (4) particularly describes the things to be seized.

**History:** En. 95-704 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 7, Ch. 184, L. 1977.

#### Amendments

The 1977 amendment made minor changes in phraseology, punctuation and style.

#### Affirmation Must Be Reduced to Writing

Contemporaneous oral declarations to magistrate cannot be used to bolster insufficient affidavit to establish probable cause, unless such declarations are sworn, signed, reduced to writing and made part of affidavit. *State ex rel. Townsend v. District Court*, — M —, 543 P 2d 193.

#### Authority to Issue Warrant

The word "judge" used in this section does not include a police magistrate as a person authorized to issue search warrants, and thus any search warrant issued by a police magistrate is void. *State v. Tropf*, — M —, 530 P 2d 1158.

A justice of the peace clearly meets the constitutional standards set out by the U. S. Supreme Court requiring a neutral and detached magistrate to determine whether reasonable cause exists for issuance of a search warrant. *State v. Snider*, — M —, 541 P 2d 1204.

Unlike a police magistrate, a justice of the peace is included within the term "any judge" in this statute, and has authority to issue search warrants. *State v. Snider*, — M —, 541 P 2d 1204.

#### Description of Place and Property

Warrant which directed law enforcement personnel to search a 1969 blue one-half ton Chevrolet pick up, Montana license 2T-5275 located in Custer County garage in Miles City, County of Custer, State of Montana sufficiently described object of search. *State v. Meidinger*, 160 M 310, 502 P 2d 58, distinguished in — M —, 516 P 2d 1159.

Search warrants stating the street address of the house to be searched was a sufficient description of the premises under this section. *State v. Paschke*, — M —, 527 P 2d 569.

#### General Warrant

Search warrants which incorporated phrase "any .22 caliber pistol" and "any

other property or evidence they might discover that may connect to the demise" of deceased was not a "general warrant," and therefore was not constitutionally invalid. *State v. Quigg*, 155 M 119, 467 P 2d 692, distinguished in 160 M 344, 502 P 2d 1138.

#### "Probable Cause"

There was not probable cause for issuance of search warrant for burglar tools and illegal drugs based on judge's personal knowledge of the accused's reputation and witnesses' observations of a pillow and tools in his car from which accused drew gun. *State v. Bentley*, 156 M 129, 477 P 2d 345.

Affidavit, based on hearsay from reliable and credible informants with no felony convictions, was sufficient basis for a search warrant for dangerous drugs where informants' statements were results of direct personal observations, reliable information as to the present status of the situation existed, and the police officers made corroborative statements that the suspect was a dangerous drug user and an associate of users of narcotics. *State v. Troglia*, 157 M 22, 482 P 2d 143.

Stolen property in plain sight which is discovered by police during lawful impounding of vehicle may be used as basis of probable cause for issuance of search warrant, even though defendant was not in vehicle at time of arrest but vehicle was later found near scene of arrest. *State ex rel. Wilson v. District Court*, 159 M 439, 498 P 2d 1217.

Application for search warrant was defective under this section, notwithstanding it informed issuing justice of criminal activity in certain room in house, since only connection between defendant and activity described was that he had a room in such house. *State ex rel. Garris v. Wilson*, 162 M 256, 511 P 2d 15, distinguished in — M —, 527 P 2d 569.

Affidavit for search warrant, based on statements of anonymous informer, which did not establish the credibility of the informer, but was verified by two other sources of information, established sufficient probable cause for issuance of the search warrant. *State v. Paschke*, — M —, 527 P 2d 569.



Statement in affidavit that a source of known reliability had told police that defendant would be traveling with cocaine and other drugs in his possession was not sufficient to establish probable cause, since the magistrate must be informed of some of the underlying circumstances from which the officer could conclude that the testimony of the anonymous informant was credible and his information reliable. *State v. Thorsness*, — M —, 528 P 2d 692.

#### **Sufficient Credibility**

Affidavit of police officer, who had acquired information from military investigator, who had acquired his information from a known and reliable informer, was of sufficient credibility to constitute probable cause for a search warrant. *Longworth v. District Court*, — M —, 530 P 2d 462.

While general rule is that affidavit for search warrant cannot be supplemented by

oral statements to issuing magistrate, rule requires only that the affidavit allege facts which, if true, give probable cause to search; it does not prohibit magistrate's oral examination of informant to determine his reliability. *State v. Thomson*, — M —, 545 P 2d 1070.

#### **Sufficient Description of Premises To Be Searched**

Search warrant which described the premises to be searched as "two cabins located near the Duck Creek 'Y', near west Yellowstone, Montana, near the office building at Koelzer's Duck Creek cabins" was of insufficient particularity where there were three cabins in the area of the office building and where police had good reason to believe that only one of the houses contained controlled substances. *State v. Ballew*, — M —, 516 P 2d 1159.

### **95-705. Scope of search with warrant.**

#### **Description of Place and Property**

Search warrant directing officers to search for "a walkie-talkie, license plates, and there may be fingerprints, letters, papers, burglary tools, and other objects

or materials which may be the fruit of an offense or evidence of an offense," sufficiently described objects to be seized. *State v. Meidinger*, 160 M 310, 502 P 2d 58, distinguished in 516 P 2d 1159.

### **95-706. Filing of application.**

#### **Application Not Filed with Court.**

Where a duplicate of the application for a search warrant was retained by a police detective, the state's argument that there was an agency relationship between the police detective and the police judge

is not valid since, under the doctrine of separation of powers, there can be no agency relationship between the executive and judicial branches of government. *State v. Tropf*, — M —, 530 P 2d 1158.

### **95-707. By whom served.**

#### **Warrant Directed to "Any Peace Officer"**

Where the same officer applied for the warrant and executed it, the fact that it was directed "to any peace officer of this state" was not a fatal defect. *State v. Snider*, — M —, 541 P 2d 1204, but see *State ex rel. Sanford v. District Court*, — M —, 551 P 2d 1005.

Having previously disapproved the practice of directing search warrants "to any peace officer of this state," the court ordered the suppression of evidence seized under such a warrant in the present case. *State ex rel. Sanford v. District Court*, — M —, 551 P 2d 1005. Cf. *State v. Meidinger*, 160 M 310, 502 P 2d 58; *State v. Snider*, — M —, 541 P 2d 1204.

### **95-717. When search and seizure not illegal.**

#### **Disclaimer**

Evidence discovered during search of house occupied by defendant's mother was properly admitted on charge of burglary since defendant disclaimed any interest in property recovered from search and had no possessory interest in his mother's home. *State v. Dess*, 154 M 231, 462 P 2d 186.

#### **Fatally Defective**

Search warrant erroneously directed to judge, and naming no particular peace officer to serve it, was fatally defective, and the defect was not a technical mistake cured by this section. *State ex rel. Stief v. Sande*, — M —, 540 P 2d 968.

#### **Infringement of Rights**

Notice to the person who is subject to



the process, concerning the origin of the process and to whom he may address his grievances, is not a technical irregularity but a matter of substantive due process, and omission or error in the name of the court is an infringement of the rights of such person, and is prejudicial error. State v. Tropf, — M —, 530 P 2d 1158.

**95-719. Stop and frisk.** (1) A peace officer may stop any person he observes in circumstances that give him reasonable cause to suspect that the person has committed, is committing, or is about to commit an offense involving the use or attempted use of force against a person or theft, damage, or destruction of property if the stop is reasonably necessary to obtain or verify an account of the person's presence or conduct or to determine whether to arrest the person.

(2) A peace officer may stop any person he finds near the scene of an offense that he has reasonable cause to suspect has just been committed if:

(a) he has reasonable cause to suspect that the person has knowledge of material aid to the investigation of the offense; or

(b) the stop is reasonably necessary to obtain or verify the person's identity or an account of the offense.

(3) A peace officer may stop any person in connection with an offense that he has probable cause to believe has been committed if:

(a) the offense is a felony involving the use or the attempted use of force against a person or theft, damage, or destruction of property;

(b) he has reasonable cause to suspect the person committed the felony; and

(c) (i) the stop is reasonably necessary to obtain or verify the person's identity to determine whether to arrest the person for the felony; or

(ii) the peace officer has reasonable cause to suspect that the person was present at the scene of the offense and the stop is reasonably necessary to obtain or verify the person's identity.

(4) A peace officer who has lawfully stopped a person under this section may:

(a) frisk the person and take other reasonably necessary steps for protection if he has reasonable cause to suspect that the person is armed and presently dangerous to him or another person present; and

(b) take possession of any object that he discovers during the course of the frisk if he has probable cause to believe the object is a deadly weapon.

(5) A peace officer who has lawfully stopped a person under this section may demand of the person his name and his present or last address.

(6) A peace officer who has lawfully stopped a person under this section shall inform the person, as promptly as possible under the circumstances and in any case before questioning the person, that he is a peace officer, that the stop is not an arrest but rather a temporary detention for an investigation, and that upon completion of the investigation the person will be released unless he is arrested.

(7) After the authorized purpose of the stop has been accomplished or 30 minutes have elapsed, whichever occurs first, the peace officer shall allow the person to go unless he has arrested the person.

**History:** En. 95-719 by Sec. 4, Ch. 513, L. 1973; amd. Sec. 8, Ch. 184, L. 1977.

#### **Amendments**

The 1977 amendment made minor changes in phraseology, punctuation and style.

**95-720. Investigative subpoena.** (1) Whenever the attorney general or a county attorney has a duty to investigate alleged unlawful activity, any justice of the supreme court or district court judge of this state may cause subpoenas to be issued commanding the persons to whom they are directed to appear before the attorney general or the county attorney and give testimony and produce such books, records, papers, documents, and other objects as may be necessary and proper to the investigation. A subpoena may issue only when it appears upon the affidavit of the attorney general or the county attorney that the administration of justice requires it to be issued.

(2) A person who, without just cause, fails to obey a subpoena served on him pursuant to this act is punishable for contempt of court.

(3) A person aggrieved by a subpoena issued pursuant to this act may, within a reasonable time, file a motion to dismiss the subpoena and, in the case of a subpoena duces tecum, to limit its scope. The motion shall be granted if the subpoena was improperly issued, or, in the case of a subpoena duces tecum, if it is overly broad in its scope.

**History:** En. 95-720 by Sec. 1, Ch. 486, L. 1977.

#### **Title of Act**

An act providing for investigative sub-

poenas for county attorneys and the attorney general; providing for procedures in relation to such subpoenas and the investigative inquiries; and providing an immediate effective date.

**95-721. Conduct of investigative inquiry.** (1) The attorney general or the county attorney may examine under oath all witnesses subpoenaed pursuant to this act. Testimony shall be recorded. The witness has the right to have counsel present at all times. If he does not have funds to obtain counsel, the judge or justice shall appoint counsel for him.

(2) The secrecy and disclosure provisions relating to grand jury proceedings apply to proceedings conducted under subsection (1). A person who divulges the contents of the application or the proceedings without legal privilege to do so is punishable for contempt of court.

(3) All penalties for perjury or preparing, submitting, or offering false evidence apply to proceedings conducted under this act.

**History:** En. 95-721 by Sec. 2, Ch. 486, L. 1977.

**95-722. Self-incrimination and immunity.** (1) No person subpoenaed to give testimony pursuant to this act may be required to make any statement or produce any evidence which may incriminate him. The attorney general or the county attorney may, with the approval of the justice or judge who authorized the issuance of the subpoena on behalf of the state,

grant any person subpoenaed immunity from prosecution or punishment for or on account of any transaction or other matter concerning which the person testifies or produces evidence pursuant to the subpoena. After being granted such immunity, no person may be excused from testifying on the grounds that his testimony may incriminate him. The immunity may not extend to prosecution or punishment for false statements given pursuant to the subpoena.

(2) Nothing in this act requires a witness to divulge the contents of a privileged communication unless the privilege is waived as provided by law.

**History:** En. 95-722 by Sec. 3, Ch. 486, L. 1977.

**95-723. Applicability of other laws—costs.** (1) The fees and mileage of witnesses subpoenaed pursuant to this act shall be the same as required in criminal actions. The state shall bear all costs, including the cost of service, when the application for the subpoena is made by the attorney general, and the appropriate county shall bear all costs, including the cost of service when the application for the subpoena is made by a county attorney.

(2) All provisions relating to subpoenas in criminal actions apply to subpoenas issued pursuant to this act, including the provisions of 95-1808 through 95-1811.

**History:** En. 95-723 by Sec. 4, Ch. 486, L. 1977.

#### **Effective Date**

Section 5 of Ch. 486, Laws 1977 provided the act should be effective on its passage and approval. Approved April 26, 1977.

## **CHAPTER 8—THE OFFICE OF THE CORONER**

### **Section**

- 95-801. The office of the coroner.  
 95-802. Coroner to have autopsy—when.  
 95-803. Coroner to hold inquest—when.

**95-801. The office of the coroner.** Whenever a coroner is informed that a death was caused by other than natural causes or that a death has occurred under circumstances such as to afford a reasonable ground to suspect that the death is the result of criminal conduct or when no physician or surgeon licensed in the state of Montana will sign a death certificate, the coroner shall make an investigation thereof. It shall be the duty of every person acquiring knowledge of such a death to report the same forthwith to the coroner of the county in which death apparently occurred. In cases where criminal conduct is suspected, the coroner shall notify the state medical examiner and one or more law enforcement agencies having jurisdiction. The law enforcement agencies so notified shall have the responsibility to investigate the case.

**History:** En. 95-801 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 24, Ch. 530, L. 1977.

#### **Amendments**

The 1977 amendment deleted "or still-

birth" in two places after "death" near the beginning of the section; inserted "the state medical examiner and" in the third sentence; and made minor changes in phraseology and punctuation.



**95-802. Coroner to have autopsy—when.** (1) If in the opinion of the coroner an autopsy is advisable, he shall order one and shall retain a medical examiner to perform it. A full record of the facts found shall be made on a form provided by the division of forensic science in triplicate, the coroner and medical examiner retaining one copy and delivering the other to the county attorney. The right to conduct an autopsy shall include the right to retain such specimens as the medical examiner performing the autopsy deems necessary. Performance of autopsies is within the discretion of the coroner except that the county attorney or attorney general may require one. In ordering an autopsy the coroner shall order the body to be exhumed if it has been interred.

(2) The state of Montana shall pay any expenses incurred whenever an autopsy or investigation is initiated at the request of the state medical examiner or attorney general. The county shall pay any expenses incurred whenever an autopsy or investigation is initiated at the request of the county attorney or county coroner.

**History:** En. 95-802 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 104, Ch. 349, L. 1974; amd. Sec. 25, Ch. 530, L. 1977.

in the second sentence; and added subsection (2).

#### Amendments

The 1974 amendment substituted "department of health and environmental sciences" for "Montana state board of health."

The 1977 amendment substituted "medical examiner" in two places for "physician or pathologist"; substituted "division of forensic science" in the second sentence for "department of health and environmental sciences"; substituted "in triplicate" for "in duplicate" in the second sentence; inserted "and medical examiner"

#### Separability Clause

Section 26 of Ch. 530, Laws 1977 read "If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications."

#### Repealing Clause

Section 27 of Ch. 530, Laws 1977 read "Sections 16-3402, 16-3403, 95-810, and 95-814, R. C. M. 1947, are repealed."

**95-803. Coroner to hold inquest—when.** An inquest is a formal inquiry into the causes of and circumstances surrounding the death of any person. The coroner shall hold an inquest only if requested to do so by the county attorney of the county in which death occurred or by the county attorney of the county in which the acts or events causing death occurred. However, when the death of any person occurs in a jail or penal institution, or from the use of a firearm by a peace officer, except where criminal charges have been or will be filed, the county attorney shall direct the coroner to hold an inquest. The coroner shall conduct the inquest with the aid and assistance of the county attorney. For holding such inquest, the coroner must summon a jury of not more than nine (9) persons, qualified by law to serve as jurors. Such inquest is to be held in accordance with sections 95-804 through 95-809 of this chapter.

**History:** En. 95-803 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 250, L. 1975.

#### Amendments

The 1975 amendment inserted the third sentence.

#### 95-810. Repealed.

##### Repeal

Section 95-810 (Sec. 1, Ch. 196, L. 1967), relating to disposition of property found

on the body, was repealed by Sec. 27, Ch. 530, Laws 1977.

**95-814. Repealed.****Repeal**

Section 95-814 (Sec. 1, Ch. 196, L. 1967), relating to technical and clerical assistance

required by the coroner, was repealed by Sec. 27, Ch. 530, Laws 1977.

**CHAPTER 9—INITIAL APPEARANCE OF ARRESTED PERSON****95-902. Duty of the court.****Appointment of Counsel**

The court's duty cannot end with a mere reading of his rights to the defendant and if defendant requests counsel to be

appointed, the court without unnecessary delay, must determine indigency and appoint counsel accordingly. *Fitzpatrick v. Crist*, — M —, 528 P 2d 1322.

**CHAPTER 10—RIGHT TO COUNSEL****Section**

**95-1005. Remuneration of appointed counsel.**

**95-1001. Right to counsel.****Attorney's Lien**

Court could not summarily impose a lien on defendant's estate in favor of county for services of counsel appointed when it was thought defendant might be indigent. *Petition of Hunsinger*, 153 M 445, 456 P 2d 304.

**Effect of Discharge of Counsel**

There was no ground for appeal based on inadequate representation where defendant attempted to discharge his appointed counsel one day before trial after counsel had adequately represented defendant for months. *State v. Forsness*, 159 M 105, 495 P 2d 176.

**Remarks About Appointment of Council**

Testimony of the police officer that the defendant did not want to talk to police but asked to call his lawyer, although irrelevant and improper, was harmless error where the state presented overwhelming evidence of guilt and the defendant himself testified at trial. *State v. Flamm*, — M —, 526 P 2d 119.

**Right to Appear and Defend by Counsel**

The court must determine indigency and appoint counsel without unnecessary delay; delay of four months in appointment of counsel which seriously prejudiced the preparation of defendant's case did not fulfill the concept of fundamental fairness and due process. *Fitzpatrick v. Crist*, — M —, 528 P 2d 1322.

**95-1002. Waiver of counsel.****Waiver of Right to Counsel**

Even though appellant was not eighteen years old, but rather seventeen years and eight months old, this section did not apply where defendant had been convicted of robbery, had I.Q. of 122, had

been in trouble with law before, had spent time in state correctional school, had been given three Miranda warnings and had waived his right to counsel. *State v. Braden*, 154 M 90, 460 P 2d 85.

**95-1005. Remuneration of appointed counsel.** (1) Whenever in a criminal proceeding an attorney represents or defends any person by order of the court on the ground that the person is financially unable to employ counsel, the attorney shall be paid for his services such sum as a district court or justice of the state supreme court certifies to be a reasonable

compensation therefor and shall be reimbursed for reasonable costs incurred in the criminal proceeding.

(2) The expense of implementing subsection (1) is chargeable to the county in which the proceeding arose, except that:

(a) in proceedings solely involving the violation of a city ordinance or state statute prosecuted in a municipal or city court, the expense is chargeable to the city or town in which the proceeding arose; and

(b) when there has been an arrest by agents of the department of fish and game or agents of the department of justice, the expense must be borne by the state agency causing the arrest.

**History:** En. 95-1005 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 186, L. 1973; amd. Sec. 1, Ch. 15, L. 1974; amd. Sec. 9, Ch. 184, L. 1977.

#### Amendments

The 1973 amendment added the exception at the end of the second sentence.

The 1974 amendment divided the second sentence into (a) and (b); added the language in subdivision (b); and made minor changes in style and phraseology.

The 1977 amendment deleted a reference to police court in subdivision (2)(a); and made minor changes in phraseology, punctuation and style.

#### "Agency Causing the Arrest"

Where, pursuant to their mandate to investigate and prosecute persons involved in the so-called "workmen's compensation scandals," agents of the department of justice obtained arrest warrants which were transmitted to a county sheriff who

took the suspects into physical custody, the arrests were "caused" by the department of justice which, by virtue of subdivision (2)(b) of this section, was liable to pay the fees of the suspects' court-appointed counsel. Application of Barron, — M —, 552 P 2d 70.

#### Withholding or Reduction in Fee

Where indigent's attorney spent two days on voir dire asking "educational questions" of prospective jurors, the trial court abused its discretion in subtracting from his claim for attorneys' fees the sum of all attorneys' fees paid for the two-day period on the theory that such an amount was equal to "the total sum wasted"; however, the court could properly have withheld the sum claimed by the attorney for his own efforts during those two days, since his course of questioning was improper, unnecessary and useless. State ex rel. Stephens v. District Court, — M —, 550 P 2d 385.

## CHAPTER 11—BAIL

### Section

- 95-1104. Bail set in warrant—acceptance by peace officer.
- 95-1118. Form of conditions of bail.
- 95-1119. Bail on a new trial.
- 95-1121. Guaranteed arrest bond certificates.
- 95-1122. Motor vehicle violations—certificates accepted in lieu of cash.

**95-1104. Bail set in warrant—acceptance by peace officer.** A peace officer may accept cash bail in behalf of a judge whenever the warrant of arrest specifies the amount of bail. Whenever a peace officer accepts bail, he shall give a signed receipt to the offender setting forth the bail received. The peace officer shall then deliver the bail to the justice of the peace or city judge before whom the offender is to appear, and the justice of the peace or city judge shall give a receipt to the peace officer for the bail delivered.

**History:** En. 95-1104 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 10, Ch. 184, L. 1977.

#### Amendments

The 1977 amendment substituted "city judge" for "police judge" in two places; and made minor changes in phraseology.



**95-1108. Bailable offenses.****Presumption of Guilt**

Trial court abused its authority in denying bail to defendant whose conviction for first-degree murder was remanded for new trial where defendant offered evidence of good conduct while in prison, was released on bail for a period of two weeks after the verdict but appeared for sentencing, made proof as to an

amount of bail and its availability, and was not a security risk; presumption of guilt sufficient to deny bail was not established by previous trial transcript where appellate court's opinion did not discuss five issues, one of which was the sufficiency of the evidence. *State v. Campbell*, 160 M 111, 500 P 2d 801.

**95-1109. Bail after conviction.****Abuse of Discretion**

Where complete presentence investigation was conducted, trial court did not abuse its discretion by refusing admission to bail pending appeal after defendant was convicted of second-degree murder and sentenced to fifty years in state prison. *State v. Kotarski*, 154 M 309, 462 P 2d 873.

Denial of bail pending determination of appeal subsequent to conviction of second degree murder was not an abuse of the discretion where based on concern

for safety of other citizens living in the area. *French v. Crist*, — M —, 518 P 2d 35.

Where the court had before it the presentence investigation report and testimony at the hearing which indicated that defendant had threatened reprisal against the witnesses, there was no abuse of discretion in denial of bail. *State ex rel. Bretz v. Sheriff of Lewis and Clark County*, — M —, 539 P 2d 1191.

**95-1116. Conditions of bail, when performed, etc.****Discharging Forfeiture**

Authority of district court to discharge the forfeiture of bail ceases upon expira-

tion of the thirty-day limitation period set forth in subsection (c). *State v. Finley*, — M —, 521 P 2d 198.

**95-1118. Form of conditions of bail.** (1) If a person is admitted to bail before conviction, the conditions of bail shall be:

(a) that he will appear to answer in the court having jurisdiction on a day certain and thereafter as ordered by the court until discharged on final order of the court and will not depart from this state without leave; and

(b) any other conditions that the court may reasonably prescribe to assure his appearance when required.

(2) If the defendant is admitted to bail after conviction, the conditions of bail shall be that:

(a) he will duly prosecute his appeal;

(b) he will appear at such time and place as the court may direct;

(c) he will not depart from this state without leave of the court; and

(d) if the judgment is affirmed or the cause reversed and remanded for a new trial, he will forthwith surrender to the officer from whose custody he was bailed.

**History:** En. 95-1118 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 11, Ch. 184, L. 1977.

**Amendments**

The 1977 amendment made minor changes in phraseology, punctuation and style.

**95-1119. Bail on a new trial.** If the judgment of conviction is reversed and the cause remanded for a new trial, the trial court may order

that the bail stand pending such trial or substitute, reduce, or increase bail.

**History:** En. 95-1119 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 12, Ch. 184, L. 1977.

#### **Amendments**

The 1977 amendment made minor changes in phraseology and punctuation.

#### **Reversal of Conviction**

Trial court abused its authority in denying bail to defendant whose conviction for first-degree murder was remanded for a new trial where defendant offered

evidence of good conduct while in prison, was released on bail for a period of two weeks after the verdict but appeared for sentencing, made proof as to an amount of bail and its availability, and was not a security risk; presumption of guilt sufficient to deny bail was not established by previous trial transcript where appellate court's opinion did not discuss five issues, one of which was the sufficiency of the evidence. *State v. Campbell*, 160 M 111, 500 P 2d 801.

**95-1121. Guaranteed arrest bond certificates.** (1) A domestic or foreign surety company which has qualified to transact surety business in this state may in any year become surety in an amount not exceeding \$100 with respect to any guaranteed arrest bond certificates issued in such year by an automobile club or association or by an insurance company authorized to write automobile liability insurance within this state, by filing with the commissioner of insurance an undertaking thus to become surety.

(2) The undertaking shall be in a form to be prescribed by the commissioner and shall state the following:

(a) the name and address of the automobile clubs, automobile associations, or insurance companies which issued the guaranteed arrest bond certificates with respect to which the surety company undertakes to be surety; and

(b) the unqualified obligation of the surety company to pay the fine or forfeiture in an amount not exceeding \$100 of any person who, after posting a guaranteed arrest bond certificate with respect to which the surety company has undertaken to be surety, fails to make the appearance to guarantee which the guaranteed arrest bond certificate was posted.

(3) The term "guaranteed arrest bond certificate" means any printed card or other certificate which:

(a) is issued by an automobile club or association or insurance company to any of its members or insureds; and

(b) is signed by the member or insured and contains a printed statement that the automobile club, automobile association, or insurance company and a surety company or an insurance company authorized to transact both automobile liability insurance and surety business in the state of Montana:

(i) guarantee the appearance of the person whose signature appears on the card or certificate; and

(ii) will, in the event of the failure of the person to appear in court at the time of trial, pay any fine or forfeiture imposed on the person in an amount not exceeding \$100.

**History:** En. 95-1121 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 13, Ch. 184, L. 1977.

#### **Amendments**

The 1977 amendment made minor changes in phraseology, punctuation and style.

**95-1122. Motor vehicle violations—certificates accepted in lieu of cash.** A guaranteed arrest bond certificate with respect to which a surety company has become surety or a guaranteed arrest bond certificate issued by an insurance company authorized to transact both automobile liability insurance and surety business within this state as provided in 95-1121 shall, when posted by the person whose signature appears thereon, be accepted in lieu of cash bail in an amount not exceeding \$100 as a bail bond to guarantee the appearance of the person in any court, including municipal courts, in this state at such time as may be required by the court when the person was arrested for violation of a motor vehicle law of this state or ordinance of a municipality in this state (except for the offense of driving while intoxicated or for any felony) committed prior to the date of expiration shown on the guaranteed arrest bond certificate. A guaranteed arrest bond certificate posted as a bail bond in a court in this state is subject to the same forfeiture and enforcement provisions as bail bonds posted in criminal cases, and a guaranteed arrest bond certificate posted as a bail bond in a municipal court in this state is subject to the forfeiture and enforcement provisions of the chapter or ordinance of the particular municipality pertaining to bail bonds posted.

History: En. 95-1202 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 14, Ch. 184, L. 1977.

#### Amendments

The 1977 amendment made minor changes in phraseology, punctuation and style.

## CHAPTER 12—PRELIMINARY EXAMINATION

### 95-1202. Proceedings at the preliminary examination.

#### Option To Use Information

Order by justice of peace setting a time and place for preliminary hearing does not prevent prosecution from proceeding instead by information filed under section 95-1301. *State v. Dunn*, 155 M 319, 472 P 2d 288.

#### Right to Preliminary Hearing

Where supporting affidavit filed under section 95-1301(a) established probable cause to the satisfaction of the district judge, defendant had no right to a preliminary hearing to conduct a "fishing expedition" for pretrial discovery of prosecution's evidence. *State v. Dunn*, 155 M 319, 472 P 2d 288.

## DECISIONS UNDER FORMER LAW

#### Right to Preliminary Hearing

Since in 1960 defendant had no right to preliminary hearing, issue of waiver of such right was irrelevant, as state could

have proceeded against him even had he prevailed at such hearing. *Pine v. Estelle*, 470 F 2d 721.

## CHAPTER 13—LEAVE TO FILE INFORMATION AND TIME FOR FILING INFORMATION

### 95-1301. Leave to file information.

#### Bypassing Preliminary Hearing

Where preliminary hearing was ordered for defendant after an initial appearance before justice of the peace, prosecutor was not precluded thereby from subsequently filing for leave to file an information under this section. *State v. Dunn*, 155 M 319, 472 P 2d 288.

#### Granting Leave

Where relators were arrested and charged with possession of dangerous drugs, district court did not err in granting leave to file informations against such persons, pursuant to this section, since probable cause existed for arrest of these persons without warrant. *State ex rel.*



Glantz v. District Court, 154 M 132, 461 P 2d 193.

#### Probable Cause

Arrest of defendant in presence of co-defendant at site of one burglary and subsequent discovery in codefendant's automobile of property stolen in another burglary earlier in same evening did not establish probable cause for information against defendant for earlier burglary. State ex rel. Wilson v. District Court, 159 M 439, 498 P 2d 1217.

Certified motion for leave to file information, which included four pages of facts discovered during investigation of homicide, together with autopsy report, was adequate to support finding of probable cause that defendant had committed deliberate homicide, aggravated assault, rape, and kidnapping. State ex rel. McKenzie v. District Court, — M —, 525 P 2d 1211.

Affidavit in support of motion for leave to file information direct which alleged only that defendant had entered a bar with a companion, that the companion had beaten the bar owner to death, that during such beating defendant had failed to restrain his companion, and that he had at least once said to the victim that "he had this coming," was insufficient to establish probable cause to believe that defendant had committed deliberate homicide, and leave to file the information should not have been granted. State ex rel. Murphy v. McKinnon, — M —, 556 P 2d 906.

#### Sufficiency of Facts Alleged

Where evidence in supporting affidavit established probable cause to satisfaction of district judge, defendant had no right to preliminary hearing to enable him to discover information and knowledge of state's witnesses. State v. Dunn, 155 M 319, 472 P 2d 288.

An affidavit is sufficient to establish

jurisdiction of the district court if it specifies that the offense was committed within the county even though the county contains an Indian reservation and the affidavit has not negated the possibility that the offense was committed within the reservation. State ex rel. Bell v. District Court, 157 M 35, 482 P 2d 557.

An affidavit which does not give specific time and place is insufficient to show probable cause even though it alleges that the defendant committed the offense of rape by intercourse with a female child under eighteen, not his spouse, within the county. State ex rel. Bell v. District Court, 157 M 35, 482 P 2d 557, distinguished in — M —, 525 P 2d 1214.

#### Supporting Affidavit

There is no requirement under subsection (a) that a supporting affidavit of a witness having direct knowledge of facts sufficient to establish probable cause be filed with the application to file an information. State v. Dunn, 155 M 319, 472 P 2d 288.

Absence of supporting affidavit for leave to file information contrary to this section was not fatal error, since it is a procedural matter and does not affect substantial rights of the defendant. State v. Logan, 156 M 48, 473 P 2d 833.

In its discretion, district court may require evidence other than affidavit for support before it grants permission for direct filing of information with district court. State ex rel. Bell v. District Court, 157 M 35, 482 P 2d 557.

Where affidavit supporting application for leave to file an information was defective for failure to show probable cause, district court had the power to allow its amendment, since the defect was a procedural one which did not divest the court of jurisdiction. State v. Emerson, — M —, 546 P 2d 509.

### 95-1302. Time for filing the information.

#### New Information Filed

Where prosecution had dismissed a first information charging receipt of stolen property and filed a new one charging both grand larceny and receipt of stolen property, the second information was timely with respect to the additional larceny

count since the first information had not been amended, but had been dismissed and permission had been granted to file a new information. State v. Tritz, 164 M 344, 522 P 2d 603, certiorari denied, 420 US 909, 42 L Ed 2d 838, 95 S Ct 828.

### 95-1303. The county attorney not filing an information.

#### Sufficiency of Motion to Amend

Certified motion for leave to file second amended information, which was signed by the county attorney but not supported by separate affidavit, was sufficient by itself as an affidavit within the meaning

of this section, although the better practice would have been to file the motion supported by a separate affidavit. State ex rel. McKenzie v. District Court, — M —, 525 P 2d 1211.

## CHAPTER 14—GRAND JURY

## Section

- 95-1401. Summoning grand juries.  
 95-1402. Objections to grand jury and to grand jurors.  
 95-1406. Advice and assistance to grand jury—who may be present—stenographer, transcript of testimony.  
 95-1407. Subpoena of witnesses.  
 95-1408. Reception of evidence.  
 95-1410. Finding and presentment of the indictment.

**95-1401. Summoning grand juries.** A grand jury must only be drawn and summoned when the district judge in his discretion considers a grand jury necessary and shall so order. The grand jury must consist of eleven (11) persons, of whom eight (8) must concur to find an indictment. The district judge may direct the selection of one (1) or more alternate jurors who shall sit as regular jurors before an indictment is found or a grand jury investigation is concluded. If a member of the jury becomes unable to perform his duty he may be replaced by an alternate. The composition and drawing of a grand jury shall be in accordance with the provisions of sections 93-1801 to 93-1804.

**History:** En. 95-1401 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 3, L. 1973.

**Amendments**

The 1973 amendment increased the grand jury from seven to eleven persons; and increased the number of votes required to find an indictment from five to eight.

**Discretion of Court**

Although judicial authority is discretionary, it is not absolute, unbridled discretion; and where two judges, having before them an application to convene a grand jury, signed by the attorney general reciting alleged criminal activity, and

alleging the inability to achieve investigatory conclusion without impaneling a grand jury, have denied such application for reasons which are erroneous as a matter of law, there has been an abuse of discretion. *State ex rel. Woodahl v. District Court*, — M —, 530 P 2d 780.

**Special Prosecutor**

Power of district court to appoint a special prosecutor to assist a grand jury in its deliberations is implicit in the provisions of this chapter, which places the district judge in over-all charge of grand jury proceedings. *State ex rel. Forsythe v. Coate*, — M —, 546 P 2d 1060.

**95-1402. Objections to grand jury and to grand jurors.** (a) \* \* \*  
 [Same as parent volume.]

(b) **Motion to Dismiss.** A motion to dismiss the indictment may be based on the grounds that the grand jury was not selected, drawn or summoned according to law, or that an individual juror was not legally qualified. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to section 95-1403 of this code that eight (8) or more jurors after deducting those not legally qualified, concurred in finding the indictment.

**History:** En. 95-1402 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 2, Ch. 3, L. 1973.

**Amendments**

The 1973 amendment increased the num-

ber of jurors specified in the latter part of the second sentence of subdivision (b) from five to eight.

**95-1405. Powers and duties of grand jury.**

**Special Prosecutor**

The provisions of this section and 95-1406 relating to the appointment of a spe-

cial prosecutor are neither mandatory nor exclusive, and thus do not provide the sole means by which the grand jury may

secure the services of such an officer. State  
ex rel. Forsythe v. Coate, — M —, 546 P  
2d 1060.

**95-1406. Advice and assistance to grand jury—who may be present—stenographer, transcript of testimony.** (1) The grand jury may at all times ask the advice of the court or the judge thereof, the attorney general, or the county attorney. Unless such advice is asked, the judge of the court shall not be present during the sessions of the grand jury.

(2) The county attorney or the attorney general may at all times appear before the grand jury for the purpose of giving information or advice relative to any matter cognizable by the grand jury and may interrogate witnesses before the grand jury whenever he thinks it necessary. When a charge against or involving the county attorney, deputy county attorney, or anyone employed by or connected with the office of the county attorney is being investigated by the grand jury, the county attorney, deputy county attorney, or all or any one or more of them shall not be allowed to be present in an official capacity before the grand jury when the charge is being investigated. They or he shall only be present while a witness and after appearing as a witness shall leave the place where the grand jury is holding session.

(3) When requested to do so by the grand jury of any county, the attorney general or county attorney may employ special counsel and investigators, who shall investigate and present the evidence acquired in such investigation to the grand jury.

(4) The grand jury or county attorney may require by subpoena the attendance of any person before the grand jury as interpreter. While his services are necessary, the interpreter may be present at the examination of witnesses before the grand jury. The compensation for the services of the interpreter constitutes a charge against the county and shall be fixed by the grand jury in an amount to be approved by the court. It shall be paid out of the county treasury on a warrant of the county auditor upon an order of the judge of the district court.

(5) (a) The grand jury may appoint a stenographer to take in shorthand the testimony of witnesses, or the testimony may be taken by a recording device, but the record so made shall include the testimony of all witnesses on that particular investigation. The shorthand notes or the recordings and transcript of the same, if any, shall be delivered to and retained by the clerk of the district court.

(b) The stenographer and any typist who transcribes the stenographer's notes or recordings shall be sworn by the foreman not to disclose any testimony or the names of any witnesses except when so ordered by the court.

(c) The stenographic reporter shall certify and file with the clerk of the district court an original transcription of his shorthand notes and a copy thereof and as many additional copies as there are defendants. The reporter shall complete the certification and filing within 10 days after the indictment has been found unless the court for good cause makes an order extending the time. The clerk of the district court shall deliver the



original of the transcript filed with him to the county attorney immediately upon his receipt thereof, retain one copy for use only by judges in proceedings relating to the indictment, and deliver a copy of the transcript to each defendant or his attorney.

**History:** En. 95-1406 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 15, Ch. 184, L. 1977.

#### Amendments

The 1977 amendment made minor changes in phraseology, punctuation and style.

**95-1407. Subpoena of witnesses.** A subpoena requiring the attendance of a witness before the grand jury may be signed and issued by the county attorney, by the foreman of the grand jury, or by the judge of the district court. The subpoena may be directed to witnesses in the state in support of the prosecution, those witnesses whose testimony, in the opinion of the issuer, is material in an investigation before the grand jury, and such other witnesses as the grand jury may direct.

**History:** En. 95-1407 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 16, Ch. 184, L. 1977.

#### Amendments

The 1977 amendment inserted "foreman of the" before "grand jury"; and made minor changes in phraseology, punctuation and style.

#### Supervision by District Court

A district court may not interfere with

a grand jury's subpoena power except (1) when the grand jury issues a subpoena duces tecum which is constitutionally overbroad; (2) where the subpoena requires self-incrimination; (3) in the clearest cases of grossly abusive conduct; (4) where the investigation goes beyond its legitimate scope; or (5) where an abuse of process would result if the court did not intervene. Matter of Secret Grand Jury Inquiry, — M —, 553 P 2d 987.

**95-1408. Reception of evidence.** (1) In the investigation of a charge, the grand jury shall receive no other evidence than that given by witnesses produced and sworn before it or furnished by legal documentary evidence or the deposition of a witness in the cases mentioned in 95-1802.

(2) The grand jury is not required to hear evidence for the defendant, but it shall weigh all the evidence submitted to it. If it has reason to believe other evidence within its reach will explain away the charge, it shall order the evidence to be produced and for that purpose may require the county attorney to issue process for witnesses.

(3) The grand jury shall find an indictment when all the evidence before it taken together, if unexplained or uncontradicted, would in its judgment warrant a conviction by a trial jury.

**History:** En. 95-1408 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 17, Ch. 184, L. 1977.

#### Amendments

The 1977 amendment made minor changes in phraseology, punctuation and style.

**95-1410. Finding and presentment of the indictment.** (a) An indictment cannot be found without the concurrence of at least eight (8) grand jurors. When so found it must be endorsed, "a true bill," and the endorsement must be signed by the foreman of the grand jury.

(b) Indictment. How Presented and Filed:

(1) and (2). \* \* \* [Same as parent volume.]

(c) If the defendant is in custody or has given bail and eight (8) jurors do not concur in finding an indictment, the foreman shall so report to the court in writing forthwith.

(d). \* \* \* [Same as parent volume.]

History: En. 95-1410 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 3, Ch. 3, L. 1973.

ber of grand jurors specified in the first sentence of subdivision (a) and in subdivision (c) from five to eight.

#### Amendments

The 1973 amendment increased the num-

### CHAPTER 15—CHARGING AN OFFENSE

#### Section

- 95-1502. Commencement of prosecutions.
- 95-1504. Joinder and discharge of offenses and defendants.
- 95-1505. Amending the charge.
- 95-1506. Procedural requirements—persistent felony offenders.
- 95-1507. Sentencing of persistent felony offender.

**95-1502. Commencement of prosecutions.** (1) All prosecutions of offenses triable in the district courts shall be by indictment or information.

(2) All other prosecutions of offenses may be by complaint.

History: En. 95-1502 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 18, Ch. 184, L. 1977.

#### Amendments

The 1977 amendment deleted "except as otherwise provided by chapter 55, Title 94, R. C. M. 1947" at the end of subsection (1); and made a minor change in style.

#### 95-1503. Form of charge.

##### Sufficiency of Charge

Information charging drug offense was insufficient where it contained neither identity of informer nor specific facts concerning the offense and identity of time and place to protect accused from double jeopardy. State ex rel. Offerdahl v. District Court, 156 M 432, 481 P 2d 338.

##### Sufficiency of Charge—Date of Offense

An information charging grand larceny committed "on or about the 19th day of August, 1973," was sufficient and did not deprive defendant of fair notice of the charge against him where the prosecution's evidence at trial showed that the crime could have been committed any time between the evening of August 17 and the morning of August 20, even though the accused's defense was to present several alibi witnesses who accounted for his

whereabouts between the night of August 18 and the morning of August 20. State v. Hall, — M —, 554 P 2d 755.

##### Sufficiency of Charge—Unlawful Sale of Drug

Information charging defendant with violation of section 54-132 for sale of dangerous drugs was sufficient even though failing to conform with specific requirements of this section, since defendant was apprised of the charges against him. State v. Dunn, 155 M 319, 472 P 2d 288.

##### When It Is Proper to Allow Endorsement after Filing

Subdivision (d) of this section does not prohibit the addition of witnesses, pursuant to 95-1803, even if their existence is known prior to the filing of the information. State v. Klein, — M —, 547 P 2d 75.

### DECISIONS UNDER FORMER LAW

#### Proof as to Time of Offense

Unless time was a material ingredient in the offense or in charging the same, it was only necessary to prove that it was com-

mitted prior to the findings or filing of the information or indictment. State v. Rogers, 31 M 1, 4, 77 P 293.

**95-1504. (111974, 111975) Joinder and discharge of offenses and defendants.** (1) An indictment, information, or complaint may charge two

or more different offenses connected together in their commission, different statements of the same offense, or two or more different offenses of the same class under separate counts. If two or more indictments, informations, or complaints are filed in such cases in the same court, the court may order them to be consolidated. Allegations made in one count may be incorporated by reference in another count. The prosecution is not required to elect between the different offenses or counts set forth in the indictment, information, or complaint, and the defendant may be convicted of any number of the offenses charged. Each offense of which the defendant is convicted must be stated in the verdict or the finding of the court.

(2) The court in which the case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the indictment, information, or complaint be tried separately or divided into two or more groups and each of the groups tried separately. An acquittal of one or more counts shall not be considered an acquittal of any other count.

(3) Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately, and all of the defendants need not be charged in each count.

(4) If it appears that a defendant or the state is prejudiced by a joinder of related prosecutions or defendants in a single charge or by joinder of separate charges or defendants for trial, the court may order separate trials, grant a severance of defendants, or provide any other relief as justice may require.

(5) When two or more persons are included in the same charge, the court may, at any time before the defendants have gone into their defense, on the application of the county attorney, direct any defendant to be discharged so that he may be a witness for the state.

(6) When two or more persons are included in the same indictment or information and the court is of the opinion that in regard to a particular defendant there is not sufficient evidence to put him on his defense, the court must order him to be discharged before the evidence is closed that he may be a witness for his codefendant.

**History:** Subsections (a) to (c); en. 95-1504 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 19, Ch. 184, L. 1977.

Subsections (d) and (e): en. Sec. 187, p. 245, Bannack Stat.; re-en. Sec. 308, p. 237, Cod. Stat. 1871; re-en. Sec. 308, 3d Div. Rev. Stat. 1879; re-en. Sec. 309, 3d Div. Comp. Stat. 1887; amd. Secs. 2075, 2076, Pen. C. 1895; re-en. Secs. 9276, 9277, Rev. C. 1907; re-en. Secs. 11974, 11975, R. C. M. 1921; Secs. 94-7206, 94-7207, R. C. M. 1947; redes. 95-1504 (d) and (e) by Sec. 29, Ch. 513, L. 1973; amd. Sec. 19, Ch. 184, L. 1977. Cal. Pen. C. Secs. 1099, 1100.

#### Compiler's Notes

Subsections (d) and (e) were originally

numbered 94-7206 and 94-7207. Section 29, Ch. 513, Laws of 1973, renumbered them to appear in this section.

#### Amendments

The 1977 amendment redesignated subsections (a) to (c) as subsections (1) to (4); redesignated subsections (d) and (e) as subsections (5) and (6); and made minor changes in phraseology, punctuation and style.

#### Multiple Counts of Same Offense

Where defendant was charged on two counts of aggravated assault under 94-5-202, both arising out of the same incident, and was acquitted on one count but convicted on the other, there was no showing



of prejudice from the trial court's refusal to grant separate trials, and therefore such refusal was not erroneous. *State v. Orsborn*, — M —, 555 P 2d 509.

### Multiple Offenses

Upon allegation of assault and battery, rape, kidnaping, and homicide, all arising from the same transaction, the prosecution is bound to prosecute them all at one time, in so far as possible, even though the court may be required to limit the number of verdicts the jury may return. *State ex rel. McKenzie v. District Court*, — M —, 525 P 2d 1211.

### "Same Class of Crimes"

Grand larceny and receipt of stolen

property are in "same class of crimes" within subsection (a); state could charge the two offenses alternatively in the same information and was not required to elect between them. *State v. Tritz*, 164 M 344, 522 P 2d 603, certiorari denied, 420 US 909, 42 L Ed 2d 838, 95 S Ct 828.

### Severance of Issues of Guilt and Sanity

Denial of defendant's motion for severance for trial of issues of defendant's guilt or innocence and his sanity was proper since sections 95-507 and 95-508 provide for those matters to be presented at same trial and to same jury. *State v. Olson*, 156 M 339, 480 P 2d 822, explained in — M —, 515 P 2d 1315.

**95-1505. Amending the charge.** (a) A charge may be amended once in matters of substance at any time, not less than 5 days before trial, without leave of court.

(b) and (c) \* \* \* [Same as parent volume.]

**History:** En. 95-1505 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 431, L. 1977.

### Amendments

The 1977 amendment inserted "once" after "amended" in subsection (a); and substituted "not less than 5 days before trial" in subsection (a) for "before the defendant pleads."

### Amendment Denied

Motion to amend date of information and to amend charge from preparation of drugs to sale of drugs, made after defendant pleaded not guilty and entered notice of alibi defense, was properly denied since amendments would destroy defense and charge a different offense. *State v. Tropf*, — M —, 530 P 2d 1158.

## DECISIONS UNDER FORMER LAW

### Amendment of Information

Allowing prosecution to amend charges in information from first degree burglary to burglary on motion presented on day

of trial was not error since elements of crime and proof required for conviction remained the same. *State v. Stewart*, — M —, 507 P 2d 1050.

**95-1506. Procedural requirements—persistent felony offenders.** (1) If the state seeks treatment of the accused as a persistent felony offender under 95-1507 or 95-2206.5 or both of those sections, notice of that fact must be given in writing to the accused or his attorney before the entry of a plea of guilty by the accused or before the case is called for trial upon a plea of not guilty.

(2) The notice must conform to the following provisions:

(a) The notice must specify the prior convictions alleged to have been incurred by the accused.

(b) The notice and the charges of prior convictions contained therein shall not be made public or in any manner be made known to the jury before the jury's verdict is returned upon the felony charge. However, if the defendant testifies in his own behalf, he is subject to impeachment as provided in 93-1901-11.

(3) If the accused is convicted upon the felony charge, the notice, together with proper proof of timely service, shall be filed with the court before the time fixed for sentencing. The court shall then fix a time for hearing with at least 3 days' notice to the accused.

(4) The hearing shall be held before the court alone. If the court finds any of the allegations of prior conviction true, the accused shall be sentenced under the provisions of 95-1507 and 95-2206.5.

**History:** En. 95-1506 by Sec. 1, Ch. 196, L. 1967; amd. Sup. Ct. Ord. 11450-2-3-4, Oct. 10, 1968, eff. Dec. 1, 1968; amd. Sec. 20, Ch. 184, L. 1977.

#### Amendments

The 1977 amendment inserted subsection designations (1) and (2); redesignated former subdivisions (c) and (d) as subsections (3) and (4); substituted "If the state seeks treatment of the accused as a persistent felony offender under 95-1507 or 95-2206.5 or both of those sections" for "When the state seeks increased punishment of the accused as a prior convicted felon under section 94-4713" at the beginning of subsection (1); substituted references to 95-1507 and 95-2206.5 for a reference to 94-4713 at the end of subsection (4); and made minor changes in phraseology, punctuation and style.

#### Constitutionality

Subsection (d) of this section does not unconstitutionally deprive accused of right to jury trial. *Newman v. Estelle*, 156 M 502, 484 P 2d 276, certiorari denied 404 US 966, 92 S Ct 341.

#### Cross-Examination of Defendant

Even though prosecutor gave notice under this section, defendant was not entitled to enjoin prosecutor from cross-examining defendant on prior convictions in the absence of a showing of prejudice from cross-examination, and de-

fendant was not prejudiced by his failure to testify after injunction was denied. *State v. Lewis*, 157 M 452, 486 P 2d 863.

#### Impeachment

Subsection (b) of this section does not change any law relative to informing the jury of a defendant's prior record for impeachment purposes; a prior record of the defendant may still be used to impeach his testimony should he decide to testify in his own behalf. *State v. Romero*, 161 M 333, 505 P 2d 1207.

#### Notice

Where state, pursuant to this section, gave proper notice to defendant of its intention to seek increased punishment if defendant was convicted on charge of rape, on basis of defendant's prior conviction of felony, there was no error since jury was not in possession of such information. *State v. Metcalf*, 153 M 369, 457 P 2d 453.

#### Sufficiency of Evidence

Mere showing that defendant's name is similar to name of person on charge sheet showing alleged prior offense is not sufficient to authorize enhanced sentence; there must be competent proof that defendant is same person as one named on charge sheet; failure to produce such proof does not invalidate conviction, only sentence. *State v. Cooper*, 158 M 102, 489 P 2d 99.

**95-1507. Sentencing of persistent felony offender.** (1) A persistent felony offender is an offender who has previously been convicted of a felony and who is presently being sentenced for a second felony committed on a different occasion than the first. An offender is considered to have been previously convicted of a felony if:

(a) the previous felony conviction was for an offense committed in this state or any other jurisdiction for which a sentence to a term of imprisonment in excess of 1 year could have been imposed;

(b) less than 5 years have elapsed between the commission of the present offense and either:

(i) the previous felony conviction; or

(ii) the offender's release on parole or otherwise from prison or other commitment imposed as a result of the previous felony conviction; and

(c) the offender has not been pardoned on the ground of innocence and the conviction has not been set aside in a postconviction hearing.

(2) A persistent felony offender shall be imprisoned in the state prison for a term of not less than 5 years or more than 100 years if he was 21 years of age or older at the time of the commission of the present offense.

(3) Except as provided in 95-2206.18, the imposition or execution of the first 5 years of a sentence imposed under subsection (2) may not be deferred or suspended.

**History:** En. 95-1507 by Sec. 5, Ch. 513, L. 1973; amd. Sec. 21, Ch. 184, L. 1977; amd. Sec. 11, Ch. 584, L. 1977.

#### Compiler's Notes

This section was amended twice in 1977, once by Ch. 184 and once by Ch. 584. Since the amendments do not appear to conflict, the code commissioner has made a composite section embodying the changes made by both amendments.

#### Amendments

Chapter 184, Laws 1977 made changes in the arrangement, phraseology, punctuation and style, but without apparent change in substance.

Chapter 584, Laws of 1977 added subsection (3); and made minor changes in phraseology, punctuation and style.

### DECISIONS UNDER FORMER LAW

#### Harmless Admission

Where defendant's prior conviction of felony was not charged during trial but was admitted by the defendant in his testimony, such admission was not prejudicial since the sentence he finally received was less than he would have received under the second offense statute.

Petition of Gallagher, 153 M 440, 456 P 2d 306.

#### Void Conviction

Where prior felony conviction was void because of denial of due process during arraignment, it was improper to sentence a defendant under second offense statute. Lewis v. State, 153 M 460, 457 P 2d 765.

### CHAPTER 16—ARRAIGNMENT OF DEFENDANT

#### 95-1606. Procedure on arraignment.

##### Conditional Pleas Not Authorized

A plea of guilty, voluntarily and understandingly made, constitutes a waiver of nonjurisdictional defects and defenses, including claims of violations of constitutional rights made prior to the plea. State v. Turcotte, — M —, 524 P 2d 787.

##### Withdrawal of Guilty Plea

Defendant who pleaded guilty to a

lesser offense after the jury was seated, but prior to the calling of any witnesses, and then two months later withdrew his guilty plea, was properly re-charged with the original greater offense without violation of his protection against double jeopardy, since jeopardy does not attach in Montana until after the first witness is sworn. State v. Cunningham, — M —, 535 P 2d 186.

#### 95-1608. Irregularity of arraignment.

##### Failure to File Affidavit

Failure of county attorney to support request for direct information with accompanying affidavit contrary to section 95-

1301 was a procedural matter that did not affect substantial rights of the defendant. State v. Logan, 156 M 48, 473 P 2d 833.

### CHAPTER 17—PRETRIAL MOTIONS

#### Section

- 95-1703. Dismissal on motion of court or application of attorney prosecuting.
- 95-1704. Time of making motion.
- 95-1706. Effect of determination.
- 95-1707. Transfer of trial.
- 95-1711. Effect of multiple charges and former prosecutions.



**95-1701. Defenses and objections which may be raised before trial.****Entrapment**

Testimony that police informant bought defendant two drinks, inquired if defendant knew where informant could buy narcotics and thereafter followed defendant's lead to a house where informant was able to purchase LSD did not estab-

lish entrapment as a matter of law; casual offer to buy unaccompanied by pleading, begging or coercing of the accused does not constitute entrapment. State ex rel. Hamlin v. District Court, First Judicial Dist., Lewis and Clark County, — M —, 515 P 2d 74.

**95-1702. Defenses and objections which must be raised before trial.****Delay of Sixteen Months Not Prejudicial**

Even though the house had been razed one year after the fire, delay of sixteen months in the filing of arson charge, due to misplacement of evidence samples by the prosecution, was not prejudicial to defendant, since the laboratory samples of incriminating evidence were still intact, sealed, and capable of examination, and could have been examined by defendant's chemist. State v. Burtchett, — M —,

530 P 2d 471, certiorari denied, 420 US 974, — L Ed 2d —, 95 S Ct 1397.

**Waiver**

Failure to object in trial court that application for permission to file an information was not accompanied by supporting affidavit contrary to section 95-1301 waived the objection. State v. Logan, 156 M 48, 473 P 2d 833.

**95-1703. Dismissal on motion of court or application of attorney prosecuting.** (1) The court may, either on its own motion or upon the application of the attorney prosecuting, and in furtherance of justice, order an action, complaint, information, or indictment to be dismissed. The reasons of the dismissal must be set forth in an order entered upon the minutes.

(2) The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed in the following cases:

If a defendant, after entry of plea upon a complaint, information, or indictment charging a misdemeanor, whose trial has not been postponed upon his application, is not brought to trial within six months.

(3) An order for the dismissal of an action, as provided in this chapter, is a bar to any other prosecution for the same offense if it is a misdemeanor, but it is not a bar if the offense is a felony.

**History** En. 95-1703 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 173, L. 1971.

**Amendments**

The 1971 amendment designated the former provisions as subsection (1) and added subsections (2) and (3).

**Prompt Trial**

A dismissal for delay should be granted with prejudice only where serious harm would be inflicted on the accused's rights by a reprosecution; and in making its determination the court should consider, among other factors, the seriousness of the offense, the facts and circumstances of the case which led to the dismissal, and the impact of a reprosecution on the right to a speedy trial and on the administration of justice. State v. Steward, — M —, 543 P 2d 178.

Subsection (3) of this section contains no mandate to reprove where the original proceeding is dismissed for delay; the state may exercise discretion in determining whether to reprove and the court may exercise the same discretion in determining whether the dismissal is with or without prejudice. State v. Steward, — M —, 543 P 2d 178.

Where defendant was charged with performing lewd and lascivious acts against children and his arraignment was set 406 days after arrest, offense was not of such serious nature as to require reprosecution for protection of society, the delay and attendant prejudice to defendant could not be remedied by reprosecution, and reprosecution would tend to negate rights protected by dismissal due to denial of speedy trial; dismissal of information with prejudice was affirmed. State v. Steward, — M —, 543 P 2d 178.

**95-1704. Time of making motion.** The motion provided for in 95-1701 and 95-1702 shall be made before the plea is entered, but the court for cause may permit it to be made within a reasonable time thereafter.

**History:** En. 95-1704 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 22, Ch. 184, L. 1977.

**Amendments**

The 1977 amendment inserted "provided for in 95-1701 and 95-1702."

**95-1706. Effect of determination.** (1) If a motion is determined adversely to the defendant, he shall plead if he has not previously pleaded. A plea previously entered shall stand.

(2) If the court directs the action to be dismissed, the defendant must, if in custody, be discharged therefrom or, if admitted to bail, have his bail exonerated or money deposited instead of bail refunded to him. However, if the court grants a motion to dismiss based on a defect in the institution of the prosecution or in the indictment, information, or complaint or if it appears at any time before judgment that a mistake has been made in charging the proper offense, the court may also order that the defendant be held in custody or that his bail be continued for a specified time pending the filing of a new complaint, indictment, or information.

**History:** En. 95-1706 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 23, Ch. 184, L. 1977.

**Amendments**

The 1977 amendment made minor changes in phraseology, punctuation and style.

**95-1707. Transfer of trial.** If the court determines that a motion to dismiss based upon the grounds of lack of jurisdiction or improper place of trial is well founded, it may, instead of ordering dismissal, order the cause transferred to a court of competent jurisdiction or to a proper place of trial.

**History:** En. 95-1707 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 24, Ch. 184, L. 1977.

**Amendments**

The 1977 amendment made minor changes in phraseology and punctuation.

**95-1708. Motion for continuance.**

**Absence of Witnesses**

Trial court did not abuse its discretion in denying continuance to allow defendants time to locate two missing witnesses where defendants' counsel had no knowledge of the whereabouts of the missing witnesses and no showing was made that the testimony of the two witnesses would help the defense. *State v. DiGiallonardo*, 160 M 379, 503 P 2d 43.

**Substitution of Counsel**

Denial of motion for continuance based on substitution of counsel was not an abuse of discretion or a denial of defendants' constitutional right to counsel where defendants had refused for three months to communicate with court-appointed counsel and first attempted to obtain alternate counsel on the day before trial. *State v. Spurlock*, 161 M 388, 506 P 2d 842.

**95-1709. Superseded by Supreme Court Rule, 34 State Reporter 26.**

**Supersession**

This section (Sec. 1, Ch. 196, L. 1967; amd. Sup. Ct. Ord. 11450-2-3-4, Oct. 10, 1968), relating to substitution of judge, is

superseded by Supreme Court Rule 34 State Reporter 26. The Rule is printed in a note following sec. 93-901.

**95-1710. Change of place of trial.****Justice of the Peace Courts**

Since, by virtue of section 95-2009, a defendant tried in a justice of the peace court is provided with the right to a trial de novo, the word "judge" in section 95-1709 does not include "justice of the peace" and a justice of the peace may not be disqualified on a simple affidavit for substitution of judge under section 95-1709, rather the provisions of chapter 95-

20 must be followed. *Bailey v. State*, — M —, 517 P 2d 708.

**Opinion of Others**

Petition signed by 201 citizens of county where crime occurred stating the signatories' opinion that defendant could not receive a fair trial in that county was properly given little weight by the trial judge. *State v. Lewis*, — M —, 546 P 2d 518.

**95-1711. Effect of multiple charges and former prosecutions. (1) (a)**

The term "same transaction" includes conduct consisting of:

(i) a series of acts or omissions which are motivated by a purpose to accomplish a criminal objective and which are necessary or incidental to the accomplishment of that objective; or

(ii) a series of acts or omissions which are motivated by a common purpose or plan and which result in the repeated commission of the same offense or affect the same person or persons or the property thereof.

(b) An offense is an "included offense" when:

(i) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged;

(ii) it consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or

(iii) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpability suffices to establish its commission.

(2) When the same transaction may establish the commission of more than one offense, a person charged with such conduct may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if:

(a) one offense is included in the other;

(b) one offense consists only of a conspiracy or other form of preparation to commit the other;

(c) inconsistent findings of fact are required to establish the commission of the offenses;

(d) the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct; or

(e) the offense is defined to prohibit a continuing course of conduct and the defendant's course of conduct was interrupted, unless the law provides that the specific periods of such conduct constitute separate offenses.

(3) If the offenses were known to the attorney prosecuting upon sufficient evidence to justify the filing of an information or the issuance of a warrant of arrest and were consummated prior to the original charge and if the jurisdiction and venue of the several offenses lie in a single court, a prosecution based upon the same transaction as a former prosecution is barred by such former prosecution under the following circumstances:



(a) The former prosecution resulted in an acquittal. There is an acquittal whenever the prosecution results in a finding of not guilty by the trier of fact or in a determination that there is insufficient evidence to warrant a conviction. A finding of guilty of a lesser included offense than the offense charged which is subsequently set aside is an acquittal of the greater inclusive offense that was charged.

(b) The former prosecution was terminated, after a complaint had been filed on a misdemeanor charge or after an information had been filed or an indictment found on a felony charge, by a final order of judgment for the defendant which has not been set aside, reversed, or vacated and which necessarily required a determination inconsistent with a fact or a legal proposition that must be established for conviction of the offense.

(c) The former prosecution resulted in a conviction. There has been a conviction whenever the prosecution resulted in:

- (i) a judgment of conviction which has not been reversed or vacated;
- (ii) a verdict of guilty which has not been set aside and which is capable of supporting a judgment, so long as failure to enter judgment was for a reason other than a motion of the defendant; or
- (iii) a plea of guilty accepted by the court, so long as failure to enter judgment was for a reason other than a motion of the defendant.

(d) The former prosecution was improperly terminated. Except as provided in this subsection (d), there is an improper termination of a prosecution whenever the termination is for reasons not amounting to an acquittal and takes place after the first witness is sworn but before verdict. Termination under either of the following circumstances is not improper:

(i) The defendant consents to the termination or waives his right to object to the termination.

(ii) The trial court, in the exercise of its discretion, finds that the termination is necessary because:

(A) it is physically impossible to proceed with the trial in conformity with law;

(B) there is a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law;

(C) prejudicial conduct in or outside the courtroom makes it impossible to proceed with the trial without manifest injustice to either the defendant or the state;

(D) the jury is unable to agree upon a verdict; or

(E) false statements of a juror on voir dire prevent a fair trial.

(4) When conduct constitutes an offense within the concurrent jurisdiction of this state and of the United States or another state or of two courts of separate, overlapping, or concurrent jurisdiction in this state, a prosecution in any such other jurisdiction is a bar to a subsequent prosecution in this state under the following circumstances:

(a) The first prosecution resulted in an acquittal or in a conviction as defined in subsection (3) and the subsequent prosecution is based on an offense arising out of the same transaction.

(b) The former prosecution was terminated, after the complaint had been filed on a misdemeanor charge or after the information had been

filed or the indictment found on a felony charge, by an acquittal or by a final order or judgment for the defendant which has not been set aside, reversed, or vacated; and the acquittal, final order, or judgment necessarily required a determination inconsistent with a fact which must be established for conviction of the offense for which the defendant is subsequently prosecuted.

(5) A prosecution is not a bar within the meaning of subsections (3) and (4) under any one or more of the following circumstances:

(a) The former prosecution was before a court which lacked jurisdiction over the defendant or the offense.

(b) The former prosecution was procured by the defendant without the knowledge of the proper prosecuting officer or with the purpose of avoiding the sentence which might otherwise be imposed.

(c) The former prosecution resulted in a judgment of conviction which was held invalid in a postconviction hearing.

**History:** En. 95-1711 by Sec. 6, Ch. 513, L. 1973; amd. Sec. 25, Ch. 184, L. 1977.

#### **Amendments**

The 1977 amendment made minor changes in phraseology, punctuation and style.

#### **Constitutionality**

This statute does not violate the double jeopardy clause of Montana Const., Art. II, § 25 or the Fifth Amendment to United States Constitution, since states are allowed some discretion as to when jeopardy attaches. *Cunningham v. District Court*, 406 F Supp 430.

#### **Federal and State Prosecution**

Conviction under federal law for making false statements in connection with federal research grant funds did not bar prosecution for embezzlement of state funds under state law, since defendant had received grants from both state and federal sources, and the university had kept separate accounts for each grant. *State ex rel. Zimmerman v. District Court*, — M —, 541 P 2d 1215.

#### **Multiple Offenses**

Upon allegation of assault and battery, rape, kidnaping, and homicide, all arising from the same transaction, the prosecution is bound to prosecute them all at one time, in so far as possible, even though the court may be required to limit the number of verdicts the jury may return. *State ex rel. McKenzie v. District Court*, — M —, 525 P 2d 1211.

#### **Same Transaction**

Federal charges against defendant did not arise from the same transaction as state charges, since each charge of the federal indictment and each charge of the state information constituted a separate act by defendant; and, where the embezzled funds belonged to two different research foundations, neither the same victims nor the same property was involved in the state and federal prosecutions. *State ex rel. Zimmerman v. District Court*, — M —, 541 P 2d 1215.

### **DECISIONS UNDER FORMER LAW**

#### **Constitutionality**

Although the point at which jeopardy attached in Montana was slightly different from the point at which jeopardy attached under federal law, Montana statute providing that jeopardy attached after first witness was sworn did not violate United States constitutional standards of double jeopardy. *State v. Cunningham*, — M —, 535 P 2d 186.

#### **Same Transaction**

Information that did not particularize the charge against defendant was not factually defective, since prosecution for same transaction that resulted in earlier conviction is expressly barred. *State v. Dunn*, 155 M 319, 472 P 2d 288.

Defendant's conviction of driving while intoxicated and operating a motor vehicle with improper brakes did not bar a subsequent prosecution for involuntary manslaughter. *State v. McDonald*, 158 M 307, 491 P 2d 711.

## CHAPTER 18—PRODUCTION AND SUPPRESSION OF EVIDENCE

**Section**

- 95-1803. Discovery, inspection, and notice.  
 95-1807. Compelling testimony: immunity from prosecution.  
 95-1808. "Witness" and "state" defined.  
 95-1809. [Transferred from Title 94.]  
 95-1810. Witness from another state summoned to testify in this state.  
 95-1811, 95-1812. [Transferred from Title 94.]  
 95-1813. Payment for medical evidence.  
 95-1814. Videotape testimony allowed.  
 95-1815. Videotape proceedings—who may attend.  
 95-1816. Court record—privacy of victim.

**95-1801. Subpoenas.****Power to Subpoena**

A subpoena must be issued by a court and is not available to the attorney general or other prosecuting attorneys inde-

pendent of a court or a grand jury. State ex rel. Woodahl v. District Court, — M —, 530 P 2d 780.

**95-1802. Depositions.****Admissibility in Evidence**

In rape case, testimony of witness given at preliminary hearing in defendant's presence, where witness had been cross-examined by defendant's counsel, and where testimony had been recorded and transcribed by court reporter, was expressly admissible in evidence under this section where proper foundation had been laid first by showing that witness could not be located for trial. State v. Bouldin, 153 M 276, 456 P 2d 830.

**Availability of Witness**

Allowing testimony of purchasers in drug case to be presented by deposition

was error where no subpoena had been issued for purchasers and they had appeared in state to testify at another trial six days after conclusion of accused's trial. State v. LaCario, — M —, 518 P 2d 982.

**Unwillingness of Witness**

Affidavit showing that witness had not answered defendant's mailed request to contact attorney to arrange for interview did not sufficiently establish witness's unwillingness to provide information so as to require a court-ordered deposition. State v. Dunn, 155 M 319, 472 P 2d 288.

**95-1803. Discovery, inspection, and notice.** In all criminal cases originally triable in district court the following rules apply:

(1) For the purpose of notice only and to prevent surprise, the prosecution shall furnish to the defendant and file with the clerk of the court at the time of arraignment a list of the witnesses the prosecution intends to call. The prosecution may, any time after arraignment, add to the list the names of any additional witnesses upon a showing of good cause. The list shall include the names and addresses of the witnesses. This subsection does not apply to rebuttal witnesses.

(2) (a) On motion of any party within a reasonable time before trial, each party shall produce at a reasonable time and place designated by the court all documents, papers, or things which it intends to introduce in evidence. Each party shall, in the presence of a person designated by the court, be permitted to inspect or copy any such documents, papers, or things. The order shall specify the time, place, and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just. If the evidence relates to scientific tests or experiments, the opposing party shall, if practicable, be permitted to be present during the tests and to inspect the results thereof. Upon



a sufficient showing, the court may at any time order that the discovery or inspection be denied, restricted, or deferred or make other appropriate orders.

(b) If, subsequent to compliance with an order issued pursuant to this rule and prior to or during trial, a party discovers additional material previously requested which is subject to discovery or inspection under this rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional material. The court shall exclude any evidence not presented for inspection or copying pursuant to this rule unless good cause is shown for failure to comply. In the latter case the opposing party is entitled to a recess or a continuance during which it may inspect or copy the evidence in the manner provided for in this subsection (2).

(3) (a) For purpose of notice only and to prevent surprise, the defendant shall furnish to the prosecution and file with the clerk of the court, at the time of entering his plea of not guilty or within 10 days thereafter or at such later time as the court may for good cause permit, a statement of intention to interpose the defense of mental disease or defect, self-defense, or alibi.

(b) If the defendant intends to interpose any of these defenses, he shall also furnish to the prosecution and file with the clerk of the court the names and addresses of all witnesses to be called by the defense in support thereof. Prior to trial the defendant may, upon motion and showing of good cause, add to the list of witnesses the names of any additional witnesses. After the trial commences, no witnesses may be called by the defendant in support of these defenses unless the name of the witness is included on the list, except upon good cause shown.

(4) All matters which are privileged upon the trial are privileged against disclosure through any discovery procedure.

**History:** En. 95-1803 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 26, Ch. 184, L. 1977.

case against him. *Radford v. Stewart*, 320 F Supp 826, affirmed in 472 F 2d 1161.

#### Amendments

The 1977 amendment deleted a former subdivision providing that subpoenas could be used as a discovery device pursuant to 95-1801(d); substituted "mental disease or defect" for "insanity" near the end of subdivision (3)(a); and made minor changes in phraseology, punctuation and style. For prior version, see parent volume.

#### Constitutionality

While this section may be unconstitutionally applied, it is constitutional on its face and not repugnant to 4th, 5th, 6th, and 14th Amendments of constitution of United States. *State ex rel. Sikora v. District Court*, 154 M 241, 462 P 2d 897.

Defendant's rights under fifth, sixth and fourteenth amendments of the United States Constitution were not violated by operation of subsection (d) of this section where neither defendant's witness list nor his notice of insanity and self-defense was used to make a *prima facie*

#### Amendment After Notice of Alibi

Motion to amend date of information made after defendant pleaded not guilty and entered notice of alibi defense was properly denied, since it would destroy the defense and be a substantial prejudice to the rights of the defendant. *State v. Tropf*, — M —, 530 P 2d 1158.

#### Amendment of Witness List

Allowing amendment of witness list to include victim of crime was not an abuse of discretion on the part of trial judge. *State v. Campbell*, 160 M 111, 500 P 2d 801.

Where leave is sought to add to the witness list during the course of trial, the court must determine whether there is a "substantial reason" to add witnesses at that time, and why they could not be disclosed earlier, whether addition of witnesses is prejudicial to the defense on account of surprise, and if so, whether the surprise can be overcome by granting a

continuance; if there is no prejudice, or if it can be cured by a continuance, then the additional witnesses should be added and necessary remedial measures taken. *State v. Klein*, — M —, 547 P 2d 75.

#### **Defenses of Insanity and Self-Defense**

This section, as it relates to defenses of insanity and self-defense, is to be interpreted as directory only. *State ex rel. Sikora v. District Court*, 154 M 241, 462 P 2d 897.

There was no reversible error in making defendant comply with insanity and self-defense notice provisions of subd. (d) of this section, where state court had already decided that section required reciprocal duties of prosecution, state operated in good faith at trial, and facts otherwise revealed no prejudice to defendant. *Radford v. Stewart*, 472 F 2d 1161.

#### **Failure To File Notice of Defense**

Trial judge might allow psychiatric proof even though motion was untimely but, where defendant's counsel did not comply with court order to submit all motions of defense at time of pleading to information or during six-month delay in going to trial, trial court properly denied defendant's notice of intention to rely on mental disease or defect under sub-

section (d) of this section as not being timely filed. *State v. Bentley*, 155 M 383, 472 P 2d 864.

#### **Failure to Produce Evidence**

Where it appeared that state's failure to produce certain items of physical evidence pursuant to an order to do so was due to the negligent loss, misplacement or destruction of the items, district court correctly refused to grant defendant's motion to dismiss, since he could not show that failure to produce affected outcome of case. *State v. Craig*, — M —, 545 P 2d 649.

#### **Harmless Error**

Defendant was not prejudiced by prosecution's citation of section 94-8904, which had been repealed and replaced by this section, in adding witnesses; this section was a continuation of section 94-8904. *State v. Rozzell*, 157 M 443, 486 P 2d 877.

#### **Reversal of Conviction**

State's refusal to comply with discovery requests, and its efforts in withholding evidence and notice of witnesses were contrary to this section and required reversal of defendant's conviction. *State v. Keller*, — M —, 553 P 2d 1013.

### **95-1804. Motion to produce confession or admission.**

#### **List of Witnesses**

In the absence of surprise, testimony concerning defendant's oral admission of guilt was properly admitted even though

state had not supplied the names of witnesses to the admission. *State v. Dunn*, 155 M 319, 472 P 2d 288.

### **95-1805. Motion to suppress confession or admission.**

#### **Test of Voluntariness**

In the absence of evidence of physical or psychological coercion, the defendant's handwritten confession, made about two hours after the crime was reported, and after defendant had been informed of his rights, was voluntarily given, and admissible at trial. *State v. Smith*, — M —, 523 P 2d 1395.

#### **Voluntary Waiver of Rights**

Although the finding of the trial court

will not be reversed unless clearly against the weight of evidence, where testimony of the defendant as to whether he had been informed of his rights was contradictory and self-impeaching and there was testimony from three police officers that he had, in fact, been informed of his rights, there was not sufficient credible testimony to support the finding of the trial court that the defendant did not effectively waive his rights. *State v. Smith*, — M —, 523 P 2d 1395.

### **95-1806. Motion to suppress evidence illegally seized.**

#### **Admissibility of Suppressed Evidence in Proceedings Other Than Trial**

Evidence of drugs seized in a search conducted under a defective warrant, although not admissible in any prosecution for possession of the drugs, may properly be considered in revoking a previously deferred sentence. *State v. Thorsness*, — M —, 528 P 2d 692.

#### **Hearing**

"Hearing" contemplated by this section is full judicial hearing with record made; no "hearing" was held where only record was clerk's docket entry, notwithstanding court's later statement that both parties had agreed to proceed without court reporter. *State v. Feters*, — M —, 510 P 2d 1.



### Searches by Private Citizens

The exclusionary rule for suppression of evidence must also apply to searches by private citizens such as security guards, private detectives or political investigators, or any citizen who conducts an unreasonable search or illegal intrusion into the privacy of another. *State v. Coburn*, — M —, 530 P 2d 442.

### Timeliness of Motion

Where confusion between the parties and the district court over state intention to drop or continue prosecution after de-

fendant's conviction on assault charge caused delay in defendant's filing motion to suppress illegally seized evidence until three days before trial, the motion was neither improper, nor did the fact that it was untimely constitute a waiver under the circumstances. *State v. Bentley*, 156 M 129, 477 P 2d 345.

Defendant's failure to make timely motion to suppress evidence waived search and seizure issue for appeal, notwithstanding his objection to introduction of evidence seized. *State v. Gallagher*, — M —, 509 P 2d 852.

**95-1807. Compelling testimony: immunity from prosecution.** Before or during trial in any judicial proceeding a justice of the supreme court or judge of the district court, upon request by the attorney prosecuting or counsel for the defense, may require a person to answer any question or produce any evidence that may incriminate him. If a person is required to give testimony or produce evidence, in accordance with this section, in any investigation or proceeding he cannot be prosecuted or subjected to any penalty or forfeiture, other than a prosecution or action for perjury or contempt, for or on account of any transaction, matter or thing concerning which he testified or produced evidence.

**History:** En. 95-1807 by Sec. 7, Ch. 513, L. 1973.

### Grand Jury Proceedings

This section applies to grand jury proceedings; while the grand jury is an inquisitorial body, its proceedings are generally regarded as "judicial" in nature, and so fall within the ambit of the statute. *Kelly v. Grand Jury of Lewis and Clark County*, — M —, 552 P 2d 1399.

**Pretrial Hearing is Judicial Proceeding**  
Where defendant was directed to testify

after being given immunity from prosecution at pretrial hearing, this hearing was "judicial proceeding" under this section and defendant could be compelled to testify. *State v. Lambert*, — M —, 538 P 2d 1351.

### Purpose

The policy and purpose of immunity statutes is to aid prosecuting officials in the apprehension of offenders. *Kelly v. Grand Jury of Lewis and Clark County*, — M —, 552 P 2d 1399.

**95-1808. "Witness" and "state" defined.** "Witness" as used in 95-1809 through 95-1811, R. C. M. 1947, shall include a person whose testimony is desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution or proceeding. The word "state" shall include any territory of the United States and District of Columbia.

**History:** En. 95-1808 by Sec. 8, Ch. 513, L. 1973.

### 95-1809. [Transferred from Title 94.]

#### Compiler's Notes

This section was originally numbered 94-9002. Section 29, Ch. 513, Laws of 1973, renumbered it to appear in this title.

Because there has been no change in text, the section is not reprinted here but may be found in bound Volume Eight as sec. 94-9002.

**95-1810. Witness from another state summoned, to testify in this state.** (1) Whenever a person in any state which by its laws has made provision for commanding persons within its borders to attend and testify



in criminal prosecutions or grand jury investigations in this state is a material witness in a prosecution pending in a court of record in this state or in a grand jury investigation which has commenced or is about to commence, a judge of the court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. The certificate shall be presented to a judge of a court of record in the county in which the witness is found.

(2) If the certificate recommends that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state, it is prima facie proof of the desirability of such custody and delivery and the judge may direct that the witness be brought before him immediately. If the judge is satisfied as to the desirability of such custody and delivery, he may order that the witness be immediately taken into custody and delivered to an officer of this state. The order is sufficient authority for the officer to take the witness into custody and hold him unless and until he is released by bail, recognizance, or order of the judge issuing the certificate.

(3) Whenever a witness is summoned to attend and testify in this state, he shall be tendered the sum of 10 cents a mile for each mile and \$5 for each day that he is required to travel and attend as a witness. If the state wherein the witness is found has by statutory enactment required that the summoned witness be paid an amount in excess of the amount specified in the preceding sentence, the witness may be tendered the amount required by that state.

(4) A witness who has appeared in accordance with the provisions of the summons may not be required to remain within this state for a longer period of time than the period mentioned in the certificate unless otherwise ordered by the court.

(5) If the witness fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

History: En. Sec. 3, Ch. 188, L. 1937; amd. Sec. 1, Ch. 117, L. 1949; Sec. 94-9003, R. C. M. 1947; redes. 95-1810 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 27, Ch. 184, L. 1977.

#### Amendments

The 1977 amendment deleted "to be tendered though the said amount or amounts so required to be tendered are in excess of the said amounts in this paragraph provided for" at the end of subsection (3); and made minor changes in phraseology, punctuation and style.

### 95-1811, 95-1812. [Transferred from Title 94.]

#### Compiler's Notes

These sections were originally numbered 94-9004 and 94-701-1. Section 29, Ch. 513, Laws of 1973, renumbered them to appear

in this title. Because there has been no changes in text, the sections are not reprinted here but may be found in bound Volume Eight as secs. 94-9004 and 94-701-1.

**95-1813. Payment for medical evidence.** (1) The local law enforcement agency within whose jurisdiction an alleged incident of sexual intercourse without consent occurs shall pay for the medical examination of a victim of alleged sexual intercourse without consent, when the examina-

tion is directed by such agency and when evidence obtained by the examination is used for the investigation or prosecution of an offense.

(2) This act does not require a law enforcement agency to pay any costs of treatment for injuries resulting from the alleged offense.

**History:** En. 95-1813 by Sec. 1, Ch. 128,  
L. 1977.

**Title of Act**

An act to provide for payment for medical examination of victims of alleged sexual intercourse without consent.

**95-1814. Videotape testimony allowed.** For any prosecution commenced under 94-5-503, the testimony of the victim, at the request of such victim and with the concurrence of the prosecuting attorney, may be recorded by means of videotape for presentation at trial. The testimony so recorded may be presented at trial and shall be received into evidence. The victim need not be physically present in the courtroom when the videotape is admitted into evidence.

**History:** En. 95-1814 by Sec. 1, Ch. 384,  
L. 1977.

equipment to record the testimony of the victim in a case arising under section 94-5-503, R. C. M. 1947, sexual intercourse without consent.

**Title of Act**

An act to authorize the use of videotape

**95-1815. Videotape proceedings—who may attend.** (1) The procedural and evidentiary rules of the state of Montana which are applicable to criminal trials within the state of Montana shall apply to the videotape proceedings authorized by 95-1814 through 95-1816.

(2) The district court judge, the prosecuting attorney, the victim, the defendant, the defendant's attorney, and such persons as are deemed necessary by the court to make the recordings authorized under 95-1814 through 95-1816 shall be allowed to attend the videotape proceedings.

**History:** En. 95-1815 by Sec. 2, Ch. 384,  
L. 1977.

**95-1816. Court record—privacy of victim.** Videotapes which are part of the court record are subject to a protective order of the court for the purpose of protecting the privacy of the victim.

**History:** En. 95-1816 by Sec. 3, Ch. 384,  
L. 1977.

## CHAPTER 19—TRIAL IN DISTRICT COURT

### Section

95-1901.	Method of trial.
95-1909.	Trial jurors.
95-1910.	Order of trial.
95-1915.	Verdict.

**95-1901. Method of trial.** (a). \* \* \* [Same as parent volume.]

(b) Questions of law shall be decided by the court and questions of fact by the jury except on a trial for libel the jury shall determine both questions of law and of fact. Questions of law and fact shall be decided

by the court when a trial by jury is waived under subsection (d) of this section.

(c) Defendants in all criminal cases shall have a right to trial by jury not to exceed twelve (12) in number. The parties may agree in writing, at any time before the verdict, with the approval of the court that the jury shall consist of any number less than twelve (12).

(d) Upon written consent of the parties a trial by jury may be waived.

(e) The plea of not guilty puts in issue every material allegation of the indictment, information or complaint.

History: En. 95-1901 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 4, L. 1973.

#### Amendments

The 1973 amendment added the second sentence to subdivision (b); deleted "However, if no capital offense is involved" at the beginning of the second sentence of subdivision (c); inserted a new subdivision (d); and redesignated former subdivision (d) as subdivision (e); and made a minor change in style.

#### Instructions

Under subsection (b), trial court was bound to instruct the jury on man-

slaughter despite fact that the court may have considered the evidence in support of manslaughter weak and inconclusive since the weight to be given the evidence was a question for the jury. *State v. Taylor*, — M —, 515 P 2d 695.

#### Testimony by Accused

Defendant who voluntarily testified that he had shot the victim (but only in self-defense) could not, on appeal, argue that he had been compelled to testify in order to correct errors presented by the prosecution. *State v. Grady*, — M —, 531 P 2d 681.

### 95-1902. Plea of guilty.

#### Denial of Motion to Withdraw

Where, after originally pleading not guilty, defendant, on advice of counsel, pled guilty to a charge of burglary as part of a plea bargaining arrangement, after which time evidence of the burglary was returned to its owner, he could not change his plea back to not guilty upon recapture after his escape from jail. *State v. Sattler*, — M —, 549 P 2d 1080.

#### Voluntariness of Guilty Plea

Although examination by the court as to the voluntariness of a guilty plea is desirable and in some cases mandatory, where consideration of the entire record,

including arraignment, participation of defendant pro se throughout two years of defense tactics, and discharge of counsel with repeated references to plea bargaining each time it appeared the case would be brought on for trial, indicated that defendant's guilty plea was entered voluntarily with full understanding of the charge, and with full appreciation of constitutional rights and possible penalty, the fact that the court did not specifically question defendant at the time of the plea change did not amount to reversible error. *State v. Griffin*, — M —, 535 P 2d 498.

### 95-1904. Presence of defendant—mistrial for absence.

#### Conclusive Presumptions

Under this section there is conclusive presumption that defendant was present

at all stages of proceeding unless record affirmatively shows the contrary. *Petition of Eldiwtw*, 153 M 468, 457 P 2d 909.

### 95-1906. Order of prosecutions.

#### Prejudicial Delay

Rights of accused convict, who was held in maximum security without counsel for a period of four months, and whose trial was held seven months after his motion for a speedy trial (during which time

many of his witnesses disappeared) were severely prejudiced, and upon appeal the conviction and sentence were vacated with prejudice. *Fitzpatrick v. Crist*, — M —, 528 P 2d 1322.



**95-1909. Trial jurors.** (1) The clerk of court shall make available to the parties a list of prospective jurors with their addresses when the names have been drawn.

(2) (a) The qualifications of jurors and exemptions from jury duty are prescribed in 93-1301 through 93-1307.

(b) An exemption from service on a jury is not a cause of challenge but the privilege of the person exempted.

(3) The county attorney and the defendant or his attorney shall conduct the examination of prospective jurors. The court may conduct an additional examination. The court may limit the examination by the defendant, his attorney, or the prosecuting attorney if the court believes such examination to be improper.

(4) (a) Each party may challenge jurors for cause, and each challenge must be tried by the court.

(b) A challenge for cause may be taken for all or any of the following reasons or for any other reason which the court determines:

(i) consanguinity or relationship to the defendant or to the person who is alleged to be injured by the offense charged or on whose complaint the prosecution was instituted;

(ii) standing in the relation of guardian and ward, attorney and client, master and servant, landlord and tenant, or debtor and creditor with, or being a member of the family or in the employment of, the defendant or the person who is alleged to be injured by the offense charged or on whose complaint the prosecution was instituted;

(iii) being a party adverse to the defendant in a civil action or having complained against or been accused by him in a criminal prosecution;

(iv) having served on the grand jury which found the indictment or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment or information;

(v) having served on a trial jury which tried another person for the offense charged;

(vi) having been a member of a jury formerly sworn to try the same charge, the verdict of which was set aside or which was discharged without verdict after the case was submitted to it;

(vii) having served as a juror in a civil action brought against the defendant for the act charged as an offense;

(viii) if the offense charged is punishable with death, having such conscientious opinions as would preclude his finding the defendant guilty, in which case he must neither be permitted nor compelled to serve as a juror;

(ix) having a belief that the punishment fixed by law is too severe for the offense charged;

(x) having a state of mind in reference to the case or to either of the parties which would prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party.

(5) All challenges must be interposed before the jury is sworn, unless the cause of challenge is discovered after the jury is sworn and before the introduction of any evidence, in which case the court, in its discretion, may allow the challenge to be interposed.

(6) Each defendant shall be allowed eight peremptory challenges in capital cases, six in all other cases tried in the district court before a 12-person jury. There may not be additional challenges for separate counts charged in the indictment or information. If the indictment or information charges a capital offense as well as lesser offenses in separate counts, the maximum number of challenges is eight. The state shall be allowed the same number of peremptory challenges as all of the defendants. In a criminal case tried in the district court before a six-person jury, the state and all the defendants shall be allowed three peremptory challenges each. When the parties in a criminal case in the district court agree upon a jury consisting of a number of persons other than 6 or 12, they shall also agree in writing upon the number of peremptory challenges to be allowed.

(7) After the jury is impaneled and sworn, the court may direct that one or more alternate jurors be selected in the same manner as principal jurors. The alternate jurors shall take the same oath as the principal jurors. Each party shall have one additional peremptory challenge for each alternate juror. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury arrives at its verdict, become unable or disqualified to perform their duties. An alternate juror may not join the jury in its deliberation unless called upon by the court to replace a member of the jury. His conduct during the period in which the jury is considering its verdict shall be regulated by instructions of the trial court. An alternate juror who does not replace a principal juror shall be discharged after the jury arrives at its verdict.

(8) The jury shall return a general verdict to each offense charged.

(9) When at the close of the state's evidence or at the close of all the evidence the evidence is insufficient to support a finding or verdict of guilty, the court may on its own motion or on the motion of the defendant dismiss the action and discharge the defendant. However, the court may allow the case to be reopened for good cause shown.

**History:** En. 95-1909 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 131, L. 1974; amd. Sec. 28, Ch. 184, L. 1977.

minor changes in phraseology, punctuation and style.

#### Amendments

The 1974 amendment inserted "before a twelve (12) person jury" after "the district court" in the first sentence of subsection (f) and added the final sentence in subsection (f).

The 1977 amendment redesignated subsection (a) to (i) as subsections (1) to (9); deleted a provision for 3 peremptory challenges for cases tried in justice of the peace or police courts in subsection (6); deleted "civil or" before "criminal case" near the beginning of the next to last sentence in subsection (6); added the last sentence in subsection (6); and made

#### Harmless Error

Even where trial court erroneously refuses to sustain challenge of prospective juror for cause, removal of that person from jury by use of peremptory challenge precludes possibility of prejudice to challenging party and renders error harmless. *State v. Thomson*, — M —, 545 P. 2d 1070.

#### Juror's Prejudice

Bare fact that prospective juror was fish and game warden, hence "connected with law enforcement", is not sufficient grounds to sustain challenge for cause under subsection (4)(b)(x) of this section. *State v. Thomson*, — M —, 545 P. 2d 1070.

**Motion for Acquittal**

Court properly denied defendant's motion for acquittal for failure of state to present sufficient evidence, where defendant admitted shooting victim, and wit-

nesses testified that defendant, after quarreling with victim, had driven home to get a gun in order to accomplish the slaying. *State v. French*, — M —, 531 P 2d 373.

**95-1910. Order of trial.** (a) to (e) \* \* \* [Same as parent volume.]

(f) When the jury has been charged, unless the case is submitted to the jury on either side or on both sides without argument, the county attorney must commence and may conclude the argument. If several defendants having several defenses appear by different counsel, the court must determine their relative order in evidence and argument. Counsel, in arguing the case to the judge or jury, may argue and comment upon the law of the case as given in the instructions of the court, as well as upon the evidence of the case.

**History:** En. 95-1910 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 18, Ch. 420, L. 1975.

**Amendments**

The 1975 amendment inserted "or jury" after "judge" in the last sentence of subsection (f).

**Admission of Testimony**

Where defendant was charged with commission of lewd and lascivious acts upon female under sixteen years of age, admission of testimony from twelve other witnesses concerning other such improper actions before proof of corpus delicti, although possibly technical error under this section, was cured by later permitting prosecuting witness to take stand. *State v. Jensen*, 153 M 233, 455 P 2d 631.

**Instructions—Duty to Object and Point Out Error**

Where defendants simply objected to instruction without assigning any grounds, either general or particular, the objection was equivalent to no objection at all, and the instruction was not reviewable on appeal. *State v. Best*, 161 M 20, 503 P 2d 997.

**Instructions—Requirement that Instructions Be Written**

Requirement that offered instructions be

in writing is mandatory to preserve issue for appeal; and, where defendant failed to offer instruction in writing, the appeal was lost. *State v. Radi*, — M —, 542 P 2d 1206.

**Opening Statement of Defense**

Denial to defendant of opportunity to make opening statement concerning insanity defense until after presentation of prosecution's case was improper interference with defendant's right to have jury consider his defense. *State v. Olson*, 156 M 339, 480 P 2d 822.

**Opening Statement—Prosecution**

Prosecutor's opening statement, naming items of evidence which were later ruled inadmissible, did not constitute prejudicial error. *State v. Kolstad*, — M —, 531 P 2d 1346.

**Rebuttal Testimony**

There was no abuse of discretion in permitting rebuttal testimony after determining in chambers that it would not be a repeat of earlier testimony and thus would not place undue emphasis on any prior testimony. *State v. Flamm*, — M —, 526 P 2d 119.

**95-1911. When order of trial may be departed from.****Opening Statement of Defense**

Denial to defendant of opportunity to make opening statement concerning insanity defense until after presentation of

prosecution's case was improper interference with defendant's right to have jury consider his defense. *State v. Olson*, 156 M 339, 480 P 2d 822.

**95-1913. Conduct of jury after submission of case.****Experimenting with Exhibit**

The jury may have the privilege of examining a dangerous instrument provided they do not use it in any different

manner than that involved in the testimony, and that no new fact is discovered from their experiment which is hurtful to the defendant; thus, where there was



conflicting testimony as to whether the victim was shot during a struggle or from a distance, the jury were properly permitted to experiment with revolver in the presence of the court to test the credibility of the testimony. *State v. Thompson*, — M —, 524 P 2d 1115.

#### **Oral Instructions—Presence of Defendant**

Where jurors became confused by two of their instructions and asked bailiff to convey a question concerning them to the presiding judge and judge apparently made oral reply without court reporter in

attendance and without attempting to notify counsel, trial court committed reversible error. *State v. Herron*, — M —, 545 P 2d 678.

#### **Refusal of Further Instructions**

Where attorneys objected to the answering of written questions submitted by jury after retirement, the court properly informed the jury that the answers to the questions were contained in the instructions previously given and that the court could make no further instructions. *State v. Hawkins*, — M —, 529 P 2d 1377.

**95-1915. Verdict.** (1) The verdict must be unanimous in all criminal actions. The verdict shall be signed by the foreman and returned by the jury to the judge in open court.

(2) If there are two or more defendants, the jury, at any time during its deliberations, may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed. If the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.

(3) The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

(4) When a verdict is returned, the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not the required concurrence, the jury may be directed to retire for further deliberations or may be discharged.

**History:** En. 95-1915 by Sec. 1, Ch. 196, L. 1967; Sup. Ct. Ord. 11450-2-3-4, Oct. 10, 1968, eff. Dec. 1, 1968; amd. Sec. 2, Ch. 4, L. 1973; amd. Sec. 29, Ch. 184, L. 1977.

#### **Amendments**

The 1973 amendment substituted "unanimous in all criminal actions" at the end of the first sentence of subdivision (a) for "unanimous in all felonies and

two-thirds (2/3) in all misdemeanors and appeals from justice or police courts."

The 1977 amendment redesignated subsections (a) to (d) as subsections (1) to (4); deleted the second paragraph of subsection (3); and made minor changes in phraseology, punctuation and style. For prior version, see parent volume and 1973 amendment note.

## **CHAPTER 20—JUSTICE'S AND CITY COURT PROCEEDINGS**

### **Section**

- 95-2003. Change of place of trial.
- 95-2004. Trial in justices' and city courts.
- 95-2005. Formation of trial jury.
- 95-2006. Verdict.
- 95-2007. Sentence and judgment.
- 95-2009. Appeal.

**95-2003. Change of place of trial.** (a) The defendant or prosecution, before trial, may move for a change of place of trial on the ground that there exists in the county in which the charge is pending such prejudice that a fair trial cannot be had in such county.

(b) \* \* \* [Same as parent volume.]

(c) If the court determines that there exists in the county where the prosecution is pending such prejudice that a fair trial cannot be had it shall transfer the cause to any other court of competent jurisdiction in any county where a fair trial may be had.

**History:** En. 95-2003 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 19, Ch. 420, L. 1975.

**Amendments**

The 1975 amendment substituted "county" for "township" throughout the section.

**95-2004. Trial in justices' and city courts.** (1) Method of trial:

(a) The defendant is entitled to a jury of six qualified persons, but the parties may agree to a number less than [than] six.

(b) A trial by jury may be waived by the consent of both parties expressed in open court and entered in the docket.

(c) Questions of law shall be decided by the court and questions of fact by the jury except that, when a jury trial is waived, the court shall determine both questions of law and questions of fact.

(2) Plea of guilty. Before or during trial, a plea of guilty may be accepted when:

(a) the defendant enters a plea of guilty in open court; and

(b) the court has informed the defendant of the consequences of his plea and of the maximum penalty provided by law which may be imposed upon acceptance of such plea.

(3) Presence of defendant. The trial may be had in the absence of the defendant but, if his presence is necessary for any purpose, the court may require the personal attendance of the defendant at the trial.

(4) Time to prepare for trial. After the plea the defendant is entitled to a reasonable time to prepare for trial.

**History:** En. 95-2004 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 30, Ch. 184, L. 1977.

**Amendments**

The 1977 amendment made minor changes in phraseology, punctuation and style.

**95-2005. Formation of trial jury.** (1) At the time of preparing the district court jury list, the county jury commission shall prepare a jury list for each justice's and city court within the county. Each list shall consist of residents of the appropriate county, city, or town. The lists shall be selected in any reasonable manner which ensures fairness, and each shall include a number of names sufficient to meet the annual jury requirements of the respective court. Additional lists may be prepared if required. The lists shall be filed in the office of the clerk of the district court. The appropriate list shall be posted in a public place in each county, city, or town, and such list shall comprise the trial jury list for the ensuing year for such county, city, or town.

(2) Trial jurors shall be summoned from the jury list by notifying each one orally that he is summoned and of the time and place at which his attendance is required.

(3) The prosecuting attorney and the defendant or his attorney shall conduct the examination of prospective jurors. The court may conduct

an additional examination. The court may limit the examination by the defendant, his attorney, or the prosecuting attorney if the court believes such examination to be improper.

(4) Each party may challenge jurors for cause, and each challenge must be tried by the court. The challenge may be for any cause enumerated in 95-1909(4)(b). Each defendant shall be allowed three peremptory challenges, and the state shall be allowed the same number of peremptory challenges as all of the defendants.

**History:** En. 95-2005 by Sec. 1, Ch. 196, L. 1967; amd. Sup. Ct. Ord. 11450-2-3-4, Oct. 10, 1968, eff. Dec. 1, 1968; amd. Sec. 20, Ch. 420, L. 1975; amd. Sec. 31, Ch. 184, L. 1977.

#### Amendments

The 1975 amendment substituted "county" for "township" throughout subsection (b).

The 1977 amendments deleted a former subsection (a) which provided that juries in justice and police courts consist of six

persons unless the parties agreed to a lesser number; redesignated former subsection (b) as subsections (1) to (4); substituted "justice's and city court" in subsection (1) for "justice and police court"; and made minor changes in phraseology, punctuation and style.

#### Repealing Clause

Section 21 of Ch. 420, Laws 1975 read: "Sections 93-6802, 93-6804, 93-6807 and 93-6808, R. C. M. 1947, are repealed."

**95-2006. Verdict.** (1) The verdict of the jury must in all cases be general. It shall be returned by the jury to the judge in open court, who must enter it or cause it to be entered in the minutes. The verdict of the jury must be unanimous.

(2) When several defendants are tried together and the jury cannot agree upon a verdict as to all, the jury may render a verdict as to those in regard to whom it does agree. A judgment must be entered accordingly on the verdict, and the case as to the rest may be tried by another jury

(3) When a verdict is returned, the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not a unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

(4) The jury cannot be discharged after the cause is submitted to them until they have agreed upon and rendered their verdict, unless for good cause the court sooner discharges them.

**History:** En. 95-2006 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 3, Ch. 4, L. 1973; en. 95-2006 by Sec. 30, Ch. 513, L. 1973; amd. Sec. 32, Ch. 184, L. 1977.

#### Compiler's Notes

Chapter 513, Laws of 1973, repealed former section 95-2006, effective January 1, 1974 and enacted a new section which, except for an insignificant variation, is identical to the section as amended by Ch. 4, Laws of 1973.

#### Amendments

Chapter 4, Laws of 1973, substituted

the third sentence of subdivision (a) for a sentence reading "Two-thirds (2/3) in number of the jury may render a verdict, and such verdict so rendered shall have the same force and effect as if all jurors had concurred therein"; and substituted "unanimous concurrence" in the second sentence of subdivision (c) for "a two-thirds (2/3) concurrence."

The 1977 amendment redesignated subsections (a) to (d) as subsections (1) to (4); deleted subsection captions; and made minor changes in phraseology and punctuation.

**95-2007. Sentence and judgment.** (1) If a judgment of acquittal is rendered, the defendant must be immediately discharged.



(2) After a plea or verdict of guilty or after a judgment against the defendant, the court must designate a time for sentencing, which must be within a reasonable time after the rendering of the verdict or judgment. The sentence must be entered in the minutes of the court as soon as it is imposed.

(3) If the defendant pleads guilty or is convicted either by the court or by a jury, the court must impose a sentence as provided in 95-2206, 95-2206.1 through 95-2206.4, and 95-2207. If alcohol or other drugs are involved, the court may impose such rehabilitative measures as it considers advisable under the circumstances.

(4) The determination and imposition of sentence are the exclusive duty of the court.

**History:** En. 95-2007 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 348, L. 1973; amd. Sec. 33, Ch. 184, L. 1977.

#### Amendments

The 1973 amendment added the second, third and fourth sentences to subsection (c).

The 1977 amendment redesignated subsections (a) to (d) as subsections (1) to (4); substituted "sentence as provided in 95-2206, 95-2206.1 through 95-2206.4 and

95-2207" at the end of the first sentence of subsection (3) for "sentence of fine or imprisonment or both, as the case may be"; deleted former second and third sentences of subsection (3) reading "The court may suspend the execution of the sentence up to the maximum sentence allowed for the particular offense. The court may impose any reasonable conditions or restrictions on the sentence which it deems necessary"; and made minor changes in phraseology and punctuation.

**95-2009. Appeal.** (1) All cases on appeal from justices' or city courts must be tried anew in the district court and may be tried before a jury of six selected as provided in Title 93, chapter 50.

(2) The defendant may appeal to the district court by giving written notice of his intention to appeal within 10 days after judgment.

(3) Within 30 days, the entire record of the justice's or city court proceedings shall be transferred to the district court or the appeal shall be dismissed. It is the duty of the defendant to perfect the appeal.

**History:** En. 95-2009 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 34, Ch. 184, L. 1977; amd. Sec. 55, Ch. 344, L. 1977.

#### Compiler's Notes

This section was amended twice in 1977, once by Ch. 184 and once by Ch. 344. Since the amendments do not appear to conflict, the code commissioner has made a composite section embodying the changes made by both amendments.

#### Amendments

Chapter 184, Laws of 1977, substituted "city courts" in subsection (1) for "police courts"; substituted "selected as provided in Title 93, chapter 50" at the end of subsection (1) for "which may be drawn from either the regular panel or jury box No. 3"; substituted "justice's or city court" in the first sentence of subsection (3) for "justice or police court"; and made minor changes in phraseology, punctuation and style.

Chapter 344, Laws of 1977, made the changes made by Chapter 184, Laws of

1977, except that it did not add the new phrase at the end of subsection (1).

#### Exclusive Remedy

This section provides the exclusive remedy for one convicted in a justice's court and seeking a new trial; therefore, it was error for justice of the peace to set aside jury verdict and order a new trial in justice court pursuant to 95-2101(c)(3). *Forsythe v. Wenzholz*, — M —, 554 P 2d 1333.

#### Increased Sentence

District court may increase sentence or punishment imposed by justice of peace after trial de novo on misdemeanor charge. *State v. Fissette*, 159 M 501, 498 P 2d 1208, following *Colten v. Kentucky*, 405 US 104, 32 L Ed 2d 584, 92 S Ct 1953.

#### Interlocutory Orders

Viewing this act as a whole, it is clear that state may appeal from interlocutory orders; this section was meant only to

define and delimit the defendant's right to appeal. *State v. Bergum*, — M —, 520 P 2d 653.

#### Mandamus

Since this section provides a plain, speedy and adequate remedy at law, mandamus did not lie to compel justice of the peace to honor affidavit of disqualification. *Bailey v. State*, — M —, 517 P 2d 708.

#### Necessity of Posting Bond

An appeal from the justice court to the district court is perfected when the defendant has posted the required bond in addition to other requirements; defendant's appeal from district court conviction of assault in the third degree was dismissed by virtue of defendant's failure to post bond requested by justice of the peace. *State v. Bush*, — M —, 518 P 2d 1406.

### 95-2010. Superseded by Supreme Court Rule, 34 State Reporter 26

#### Supersession

This section (Sec. 1, Ch. 281, L. 1975), relating to disqualification of justice, magistrate, or justice of the peace, is super-

seded by Supreme Court Rule, 34 State Reporter 26. The Rule is printed in a note following section 93-901.

## CHAPTER 21—POST-TRIAL MOTIONS

#### Section

95-2101. New trial.

**95-2101. New trial.** (1) A new trial is a reexamination of the issue in the same court before another jury after a verdict or finding has been rendered. The granting of a new trial places the parties in the same position as if there had been no trial.

(2) (a) Following a verdict or finding of guilty, the court may grant the defendant a new trial if required in the interest of justice.

(b) The motion for a new trial shall be in writing and shall specify the grounds therefor. It shall be filed by the defendant within 30 days following a verdict or finding of guilty. Reasonable notice of the motion shall be served on the state.

(c) On hearing the motion for a new trial, if justified by law and the weight of the evidence, the court may:

(i) deny the motion;

(ii) grant a new trial; or

(iii) modify or change the verdict or finding by finding the defendant guilty of a lesser included crime or finding the defendant not guilty.

**History:** En. 95-2101 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 35, Ch. 184, L. 1977.

#### Amendments

The 1977 amendment deleted "finding the defendant guilty of a lesser degree of the crime charged" after "modify or change the verdict or finding by" in subdivision (2)(c)(iii); and made minor changes in phraseology, punctuation and style.

#### Bail

Trial court abused its authority in denying bail to defendant whose conviction for first-degree murder was reversed and remanded for a new trial, where de-

fendant offered evidence of good conduct while in prison, was released on bail for a period of two weeks after a verdict but appeared for sentencing, made proof as to an amount of bail and its availability, and was not a security risk; presumption of guilt sufficient to deny bail was not established by previous trial transcript where appellate court did not discuss five issues, including the sufficiency of the evidence. *State v. Campbell*, 160 M 111, 500 P 2d 801.

#### Justice Court Verdict

A justice of the peace was not within the purview of this section and could not properly grant a defendant a new trial pursuant to subdivision (2)(c); the ex-

clusive remedy for one seeking a new trial after an adverse verdict in a justice court is appeal to the district court under 95-2009. *Forsythe v. Wenholz*, — M —, 554 P 2d 1333.

#### Newly Discovered Evidence

Trial court did not err in denying defendant's motion for new trial based on newly discovered evidence in form of statements taken from two witnesses subsequent to trial where such statements were found to contain certain discrepancies by police officers who investigated facts and questioned such individuals and where such evidence added nothing new beyond mere speculation to existing evidence. *State v. Quigg*, 155 M 119, 467 P 2d 692, distinguished in 160 M 344, 502 P 2d 1138.

Motion for new trial on the basis of newly discovered evidence filed in district court after thirty-day period for filing with district court was untimely and filed in the wrong court. If the grounds for seeking a new trial do not arise until after the thirty-day period or until after the appeal is filed, the proper procedure is to stay the appeal, remand the case to the district court, file the motion, secure the district court's decision thereon, and continue with the appeal. The supreme court has no jurisdiction to entertain a motion for new trial in the first instance where no reason is advanced nor any basis apparent for failure to follow this procedure. *State v. Best*, 161 M 20, 503 P 2d 997.

### CHAPTER 22—SENTENCE AND JUDGMENT

Section	Sentence.
95-2206.	When no place of imprisonment is specified.
95-2206.2.	When no penalty is specified.
95-2206.4.	When no felony penalty is specified.
95-2206.6.	Sentence of death—hearing on imposition of death penalty.
95-2206.7.	Sentencing hearing—evidence that may be received.
95-2206.8.	Aggravating circumstances.
95-2206.9.	Mitigating circumstances.
95-2206.10.	Consideration of aggravating and mitigating factors in determining sentence.
95-2206.11.	Specific written findings of fact.
95-2206.12.	Automatic review of sentence.
95-2206.13.	Review of death sentence—priority of review—time for review.
95-2206.14.	Transcript and records of trial transmitted.
95-2206.15.	Supreme court to make determination as to the sentence.
95-2206.16.	Judicial designation as nondangerous offender for purposes of parole eligibility.
95-2206.17.	Additional sentence for offenses committed with a dangerous weapon.
95-2206.18.	Exceptions to mandatory minimum sentences and restrictions on deferred imposition and suspended execution of sentence.
95-2206.19.	Hearing to determine application of exceptions.
95-2213.	Merger of sentences.
95-2217.	Prisoner furlough program—purpose and intent.
95-2218.	Definitions.
95-2219.	Department to establish program and rules.
95-2220.	Application for participation in furlough program.
95-2221.	Consideration of application—furlough plan—notification or consent of sheriff necessary—duties of board.
95-2222.	Disposition of prisoner's earnings—trust fund—schooling costs.
95-2223.	Administrative rules—co-operation by state agencies.
95-2224.	Prisoner not agent or involuntary servant.
95-2226.1.	Responsibility of department and supervising agency—change or revocation of furlough—escape.
95-2227.	Effect of conviction.
95-2228.	Fines, costs and forfeitures, how disposed of.
95-2229.	Disposition of traffic fines collected from juveniles.

#### 95-2204. Contents of investigation.

##### Prior Charges

Evidence of prior felony charges was admissible on presentence investigation

even though there had been no previous conviction. *State v. Harris*, 159 M 425, 498 P 2d 1222.



**95-2206. Sentence.** (1) Whenever a person has been found guilty of an offense upon a verdict or a plea of guilty, the court may:

(a) defer imposition of sentence, excepting sentences for driving under the influence of alcohol or drugs, for a period not exceeding 1 year for any misdemeanor or for a period not exceeding 3 years for any felony. The sentencing judge may impose upon the defendant any reasonable restrictions or conditions during the period of the deferred imposition. Such reasonable restrictions or conditions may include:

- (i) jail base release;
- (ii) jail time not exceeding 90 days;
- (iii) conditions for probation;
- (iv) restitution;
- (v) any other reasonable conditions considered necessary for rehabilitation or for the protection of society; or
- (vi) any combination of the above;

(b) suspend execution of sentence up to the maximum sentence allowed for the particular offense. The sentencing judge may impose on the defendant any reasonable restrictions during the period of suspended sentence. Such reasonable restrictions may include:

- (i) jail base release;
- (ii) jail time not exceeding 90 days;
- (iii) conditions for probation;
- (iv) restitution;
- (v) any other reasonable conditions considered necessary for rehabilitation or for the protection of society;
- (vi) any combination of the above;
- (c) impose a fine as provided by law for the offense;
- (d) commit the defendant to a correctional institution with or without a fine as provided by law for the offense;

(e) impose any combination of subsections (1)(b), (1)(c), and (1)(d).

(2) If any restrictions or conditions imposed under subsection (1)(a) or (1)(b) are violated, any elapsed time, except jail time, shall not be a credit against the sentence, unless the court orders otherwise.

(3) (a) The district court may also impose any of the following restrictions or conditions on the sentence provided for in subsection (1) which it considers necessary to obtain the objectives of rehabilitation and the protection of society:

- (i) prohibit the defendant the right to hold public office;
- (ii) prohibit the defendant the right to own or carry a dangerous weapon;
- (iii) prohibit freedom of association;
- (iv) prohibit freedom of movement;
- (v) any other limitation reasonably related to the objectives of rehabilitation and the protection of society.

(b) Whenever the district court imposes a sentence of imprisonment in the state prison for a term exceeding 1 year, the court may also impose the restriction that the defendant be ineligible for parole and participation

in the prisoner furlough program while serving his term. If such a restriction is to be imposed, the court shall state the reasons for it in writing. If the court finds that the restriction is necessary for the protection of society, it shall impose the restriction as part of the sentence and the judgment shall contain a statement of the reasons for the restriction.

(c) The judge in a justice's, city, or municipal court does not have the authority to restrict an individual's rights as enumerated in subsections (3)(a) and (3)(b).

(4) Except as provided in 95-2206.18, the imposition or execution of the first 2 years of a sentence of imprisonment imposed under the following sections may not be deferred or suspended: 54-132(2), 54-133(3), 54-133.1(2), 94-5-102(2), 94-5-103(2), 94-5-202(2), 94-5-302(2), 94-5-303(2), 94-5-401(2), and 94-5-503(2) and (3).

(5) A judge, magistrate, or justice of the peace who has suspended the execution of a sentence or deferred the imposition of a sentence of imprisonment under this section or his successor is authorized, during the period of the suspended sentence or deferred imposition of sentence, in his discretion, to revoke the suspension or impose sentence and order the person committed. He may also, in his discretion, order the prisoner placed under the jurisdiction of the board of pardons as provided by law or retain such jurisdiction with his court. Prior to the revocation of an order suspending or deferring the imposition of sentence, the person affected shall be given a hearing.

**History:** En. 95-2206 by Sec. 31, Ch. 513, L. 1973; amd. Sec. 36, Ch. 184, L. 1977; amd. Sec. 1, Ch. 436, L. 1977; amd. Sec. 1, Ch. 580, L. 1977; amd. Sec. 12, Ch. 584, L. 1977.

#### Compiler's Notes

Chapter 513 repealed former section 95-2206 effective January 1, 1974 and enacted a new section.

This section was amended four times in 1977 by Chs. 184, 436, 580, and 584. Since the amendments do not appear to conflict, the code commissioner has made a composite section embodying the changes made by all amendments.

#### Amendments

Chapter 184, Laws of 1977, substituted "justice's, city, or municipal court" in subdivision (3)(c) for "justice court"; inserted "magistrate, or justice of the peace" near the beginning of subsection (5); and made minor changes in phraseology, punctuation and style.

Chapter 436, Laws of 1977, inserted "excepting sentences for driving under the influence of alcohol or drugs" near the beginning of subdivision (1)(a).

Chapter 580, Laws of 1977, inserted subdivision (3)(b); and made minor changes in phraseology, punctuation and style.

Chapter 584, Laws of 1977, inserted subsection (4); and made minor changes in phraseology, punctuation and style.

#### Credit for Time Elapsed Under Suspended Sentence

Crediting of elapsed time upon revocation of suspended sentence is within discretion of trial court. *Petition of Doney*, — M —, 522 P 2d 93.

Violation of conditions of work release program while serving five-year prison sentence which had been suspended to one year in the county jail, and subsequent revocation of suspension of sentence, did not destroy defendant's right to credit for all time spent in jail before trial and up to time of revocation. *Matter of Hanson*, — M —, 544 P 2d 816.

#### Deferred Imposition of Sentence

Trial court could revoke deferred imposition of sentence after defendant refused to testify against another defendant, even though his co-operation with the state was not made a formal condition of the judgment deferring sentence but was orally cited by the judge as his reason for deferring sentence. *State v. Lintz*, — M —, 509 P 2d 13.

#### Revocation of Parole or Suspension

There is no provision requiring a preliminary hearing before proceedings for revocation of parole or suspended sentence are instituted; all that is required is that the hearing be conducted with fundamental fairness. *Petition of Meidinger*, — M —, 539 P 2d 1185.

The revocation hearing is not a criminal trial but a hearing to establish a violation of the probation conditions, and the decision of the judge will not be overturned

without a showing of an abuse of discretion. *Petition of Meidinger*, — M —, 539 P 2d 1185.

## DECISIONS UNDER FORMER LAW

### Condition of Deferred Sentence

Conditioning deferred imposition of sentence on serving term of thirty days in county jail was proper exercise of court's sentencing authority where eighteen year old defendant entered guilty plea and was convicted on charge of sale of dangerous drugs. *State ex rel. Woodbury v. District Court*, 159 M 128, 495 P 2d 1119, distinguishing *State v. Drew*, 158 M 214, 490 P 2d 230.

### Condition of Parole

Imposing the condition that parolee not be found in the company of any persons under the age of eighteen years and condition that parolee refrain from being in and around the vicinity of certain grade schools, junior high schools, and high schools were within the court's discretion. In re *Petition of Dunn*, 158 M 73, 488 P 2d 902.

### Credit for Time Elapsed Under Suspended Sentence

It was not abuse of discretion for court to grant 54 days of credit against sentence of elapsed time from sentencing to revocation of suspension and deny further credit where defendant was arrested and convicted of three separate offenses after imposition of suspended sentence. In re *LeDesma*, — M —, 542 P 2d 1226.

Person convicted and given suspended sentence after service of a term in the county jail, pursuant to this section as it read prior to its 1973 revision, was entitled to credit for post-conviction jail time already served when suspension of sentence was later revoked. *Matter of LeDesma*, — M —, 554 P 2d 751.

### Discretion of Court

The Dangerous Drug Act (54-133 (c)), contemplates that a verdict or plea will be taken and the imposition of sentence deferred or stayed for no longer than three years; the court can impose conditions of probation during the deferment which are not contradictory to a stay of sentence or deferred sentence. *State v. Drew*, 158 M 214, 490 P 2d 230, distinguished in 159 M 128, 495 P 2d 1119, 1123.

When sentencing a person under 21 pursuant to a special statute (54-133(c)) of the Dangerous Drug Act, the court's discretion is limited by the presumption of entitlement to a deferred imposition of sentence under subsection 2 of former sec. 95-2206. *State v. Drew*, 158 M 214, 490 P 2d 230.

### Good Behavior

Defendant whose sentence for term of three years in state prison was ordered suspended during good behavior was improperly denied credit for time spent on parole when suspended sentence was revoked. *Barrows v. State*, 155 M 522, 474 P 2d 145.

### Jury Instructions

Instructing jury on punishments that could be imposed upon conviction, including probation, deferred sentence and suspended sentence, was prejudicial error; such instructions should not be given in future cases. *State v. Zuidema*, 157 M 367, 485 P 2d 952, distinguishing *State v. Metcalf*, 153 M 369, 457 P 2d 453.

### Revocation of Deferred Sentence

Where defendant was neither represented by counsel nor told of right to have counsel present at hearing for revocation of deferred sentence, district court erred in denying defendant's motion to vacate the prison sentence that was imposed as a result of the revocation. *Petition of Brittingham*, 155 M 525, 473 P 2d 830.

Where deferred sentence has been revoked, accused stands before sentencing judge as he did at time of original order; where one charged with assault in second degree and attempted rape was placed on two-year probation and thereafter was brought to trial and plead guilty to subsequent offenses, including another case of second degree assault, revocation of probation and imposition of six-year sentence on first assault charge and concurrent thirty-year sentence on second assault charge were not error. *Newman v. Estelle*, 156 M 502, 484 P 2d 276, certiorari denied 404 US 966, 92 S Ct 341.

### Suspension of Sentence

Where district court decision revoking defendant's probation and imposing previously deferred sentence was reversed and remanded by supreme court three years later, defendant was placed in same status he had prior to district court's decision, so that sentence had not been suspended for more than three years contrary to subsection (2) of this section. *Petition of Brittingham*, 156 M 89, 475 P 2d 34.

Where the defendant is granted a suspended sentence, sentence is imposed and execution of sentence is suspended in whole or in part up to the maximum time of sentence allowed by law, and the de-



defendant can be released on probation during the time interval with the conditions of probation imposed by the court. *State v. Drew*, 158 M 214, 490 P 2d 230.

### 95-2206.1. Repealed.

#### Repeal

Section 95-2206.1 (Sec. 31, Ch. 513, L. 1973; Sec. 37, Ch. 184, L. 1977), relating

to death sentence, was repealed by Sec. 16, Ch. 338, Laws 1977.

**95-2206.2. When no place of imprisonment is specified.** When a statute authorizes imprisonment for its violation but does not prescribe the place of imprisonment, a sentence not to exceed one (1) year shall be to the county jail.

**History:** En. 95-2206.2 by Sec. 31, Ch. 513, L. 1973.

**95-2206.3. When no penalty is specified.** The court in imposing sentence upon an offender convicted of an offense for which no penalty is otherwise provided, or if the offense is designated a misdemeanor and no penalty is otherwise provided, may sentence the offender to a term of imprisonment not to exceed six (6) months in the county jail or a fine not to exceed five hundred dollars (\$500), or both. Where statutes outside of the criminal code refer to a subsequently repealed section in Title 94 for a penalty, then the penalty shall be a fine not to exceed five hundred dollars (\$500) or imprisonment in the county jail for a term not to exceed six (6) months, or both.

**History:** En. 95-2206.3 by Sec. 31, Ch. 513, L. 1973.

**95-2206.4. When no felony penalty is specified.** The court in imposing sentence upon an offender convicted of an offense which is designated as a felony, and no penalty is otherwise provided, may sentence the offender for any term not to exceed ten (10) years in the state prison.

**History:** En. 95-2206.4 by Sec. 31, Ch. 513, L. 1973.

### DECISIONS UNDER FORMER LAW

#### Application

Statutes providing for punishment of felony when not otherwise prescribed was not applicable to sentence for robbery since it merely provides penalties for

crimes not otherwise provided for by statute. *Petition of Eldiwitw*, 153 M 468, 457 P 2d 909; *Petition of O'Rourke*, 154 M 265, 461 P 2d 1.

### 95-2206.5. Repealed.

#### Repeal

Section 95-2206.5 (Sec. 2, Ch. 312, L. 1975; Sec. 38, Ch. 184, L. 1977), relating

to designation of persistent felony offender, was repealed by Sec. 6, Ch. 340, Laws 1977.

**95-2206.6. Sentence of death—hearing on imposition of death penalty.** When a defendant is found guilty of or pleads guilty to an offense for which the sentence of death may be imposed, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing to determine the existence or nonexistence

of the circumstances set forth in 95-2206.8 and 95-2206.9 for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone.

**History:** En. 95-2206.6 by Sec. 1, Ch. 338, L. 1977.

#### **Title of Act**

An act to provide for the imposition of the death penalty in certain cases; to provide procedures and requirements for the authorization of such penalty; to provide for a separate sentencing hearing to determine the existence or nonexistence of aggravating or mitigating circumstances; to provide that the death penalty may not be imposed unless the court finds

one or more of the aggravating circumstances and finds that there are no mitigating circumstances sufficiently substantial to call for leniency; to provide that the determination of the court shall be supported by specific written findings of fact; to provide for automatic review of a judgment of conviction and sentence of death; amending sections 94-5-102, 94-5-303, 94-5-617, and 94-5-622, R. C. M. 1947; repealing sections 94-5-105, 94-5-304, and 95-2206.1, R. C. M. 1947.

### **DECISIONS UNDER FORMER LAW**

#### **Constitutionality**

By decision of the U.S. Supreme Court, statutes allowing the sentencer discretion as to whether to impose the death penalty were unconstitutional; although the conviction would be upheld, sentence of death made at discretion of the court under former statute was unconstitutional and would be commuted to life imprisonment. *State v. Rhodes*, 164 M 455, 524 P 2d 1095.

Fact that under Montana law it is the court, not the jury, which determines whether to impose the death penalty does not render imposition of the penalty unconstitutional. *State v. McKenzie*, — M —, 557 P 2d 1023, following *Proffitt v. Florida*, — US —, 49 L Ed 2d 913, 96 S Ct 2960.

The imposition of a death penalty is not invariably "cruel and unusual punishment"; it is not inhuman or barbarous in the sense that torture would be; it is clearly supported by much public sentiment; and its function in vindicating society's outrage at particularly offensive conduct, along with the possibility that it may deter some potential offenders from committing capital crimes, serves as an adequate penological justification for its imposition; therefore, since the Georgia legislature could not be said to have been clearly mistaken in its determination that the death penalty was needed, considerations of federalism required the court to approve the penalty so long as it was not disproportionate to the crime and it was not arbitrarily imposed. *Gregg v. Georgia*, — US —, 49 L Ed 2d 859, 96 S Ct 2909.

Texas statute which limited the imposition of a death penalty to five categories of intentional murders, provided that sentence was to be determined by the jury

after considering evidence in mitigation of the offense, required the jury to answer (1) whether defendant's conduct was committed deliberately and with the reasonable expectation that death would result, (2) whether there was a probability that defendant would commit future acts of violence and constitute a continuing danger to society, and (3) if the issue was raised by the evidence, whether defendant's conduct was an unreasonable response to provocation by decedent, gave adequate guidance to the jury to enable it to perform its sentencing function, and was constitutional. *Jurek v. Texas*, — US —, 49 L Ed 2d 929, 96 S Ct 2950.

Florida statute listing a number of kinds of intentional killings for which the death penalty might be considered, setting out a group of aggravating and mitigating factors to be taken into account in determining whether its imposition is justified, assigning the responsibility of sentencing to the trial judge, and providing for an automatic appeal to the state supreme court where the death penalty is imposed, provided adequate standards to guide the judge's discretion, and was constitutional. *Proffitt v. Florida*, — US —, 49 L Ed 2d 913, 96 S Ct 2960.

#### **Lying in Wait**

Where defendant had robbed a bank and in the course of his escape drove his automobile into a coulee, stopped his machine and shortly thereafter shot and killed one of his pursuers when he appeared on the top of a hill, an instruction that homicide committed by lying in wait constituted murder in the first degree under former section 94-2503 was proper. *State v. Jackson*, 71 M 421, 230 P 370.

**95-2206.7. Sentencing hearing—evidence that may be received.** In the sentencing hearing, evidence may be presented as to any matter the court considers relevant to the sentence, including but not limited to the nature

and circumstances of the crime, the defendant's character, background, history, mental and physical condition, and any other facts in aggravation or mitigation of the penalty. Any evidence the court considers to have probative force may be received regardless of its admissibility under the rules governing admission of evidence at criminal trials. Evidence admitted at the trial relating to such aggravating or mitigating circumstances shall be considered without reintroducing it at the sentencing proceeding. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

**History:** En. 95-2206.7 by Sec. 2, Ch. 338, L. 1977.

**95-2206.8. Aggravating circumstances.** Aggravating circumstances are any of the following:

(1) The offense was deliberate homicide and was committed by a person serving a sentence of imprisonment in the state prison.

(2) The offense was deliberate homicide and was committed by a defendant who had been previously convicted of another deliberate homicide.

(3) The offense was deliberate homicide and was committed by means of torture.

(4) The offense was deliberate homicide and was committed by a person lying in wait or ambush.

(5) The offense was deliberate homicide and was committed as a part of a scheme or operation which, if completed, would result in the death of more than one person.

(6) The offense was deliberate homicide as defined in subsection (1) (a) of 94-5-102 and the victim was a peace officer killed while performing his duty.

(7) The offense was aggravated kidnaping which resulted in the death of the victim.

**History:** En. 95-2206.8 by Sec. 3, Ch. 338, L. 1977.

**95-2206.9. Mitigating circumstances.** Mitigating circumstances are any of the following:

(1) The defendant has no significant history of prior criminal activity.

(2) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(3) The defendant acted under extreme duress or under the substantial domination of another person.

(4) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(5) The victim was a participant in the defendant's conduct or consented to the act.

(6) The defendant was an accomplice in an offense committed by another person, and his participation was relatively minor.



(7) The defendant, at the time of the commission of the crime, was less than 18 years of age.

(8) Any other fact exists in mitigation of the penalty.

History: En. 95-2206.9 by Sec. 4, Ch. 338, L. 1977.

**95-2206.10. Consideration of aggravating and mitigating factors in determining sentence.** In determining whether to impose a sentence of death or imprisonment, the court shall take into account the aggravating and mitigating circumstances enumerated in 95-2206.8 and 95-2206.9 and shall impose a sentence of death if it finds one or more of the aggravating circumstances and finds that there are no mitigating circumstances sufficiently substantial to call for leniency. If the court does not impose a sentence of death and one of the aggravating circumstances listed in 95-2206.8 exists, the court may impose a sentence of imprisonment for life or for any term authorized by the statute defining the offense.

History: En. 95-2206.10 by Sec. 5, Ch. 338, L. 1977.

**95-2206.11. Specific written findings of fact.** In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact as to the existence or nonexistence of each of the circumstances set forth in 95-2206.8 and 95-2206.9. The written findings of fact shall be substantiated by the records of the trial and the sentencing proceeding.

History: En. 95-2206.11 by Sec. 6, Ch. 338, L. 1977.

**95-2206.12. Automatic review of sentence.** The judgment of conviction and sentence of death are subject to automatic review by the supreme court of Montana as provided for in 95-2206.13 through 95-2206.15.

History: En. 95-2206.12 by Sec. 7, Ch. 338, L. 1977.

**95-2206.13. Review of death sentence—priority of review—time for review.** The judgment of conviction and sentence of death are subject to automatic review by the supreme court of Montana within 60 days after certification by the sentencing court of the entire record unless the time is extended by the supreme court for good cause shown. The review by the supreme court has priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration.

History: En. 95-2206.13 by Sec. 8, Ch. 338, L. 1977.

**95-2206.14. Transcript and records of trial transmitted.** The clerk of the trial court, within 10 days after receiving the transcript, shall transmit the entire record and transcript to the supreme court.

History: En. 95-2206.14 by Sec. 9, Ch. 338, L. 1977.

**95-2206.15. Supreme court to make determination as to the sentence.**

The supreme court shall consider the punishment as well as any errors enumerated by way of appeal. With regard to the sentence, the court shall determine:

- (1) whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;
- (2) whether the evidence supports the judge's finding of the existence or nonexistence of the aggravating or mitigating circumstances enumerated in 95-2206.8 and 95-2206.9; and
- (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The court shall include in its decision a reference to those similar cases it took into consideration.

History: En. 95-2206.15 by Sec. 10, Ch. 338, L. 1977.

**95-2206.16. Judicial designation as nondangerous offender for purposes of parole eligibility.** (1) The sentencing court shall designate an offender a nondangerous offender for purposes of eligibility for parole under 95-3214 if:

(a) during the 5 years preceding the commission of the offense for which the offender is being sentenced, the offender was neither convicted of nor incarcerated for an offense committed in this state or any other jurisdiction for which a sentence to a term of imprisonment in excess of 1 year could have been imposed; or

(b) the court has determined, based on any presentence report and the evidence presented at the trial and the sentencing hearing, that the offender does not represent a substantial danger to other persons or society.

(2) A conviction or incarceration may not be considered under subsection (1)(a) if:

(a) the offender was less than 18 years of age at the time of the commission of the present offense; or

(b) the offender has been pardoned for the previous offense on the grounds of innocence or the conviction for such offense has been set aside in a postconviction hearing.

History: En. 95-2206.16 by Sec. 1, Ch. 340, L. 1977.

**Title of Act**

An act to revise the law regarding eligibility for parole and the merger of sen-

tences when a second crime is committed while in prison or on parole or furlough; amending sections 95-2213, 95-3214, and 95-3215, R. C. M. 1947; repealing section 95-2206.5, R. C. M. 1947.

**95-2206.17. Additional sentence for offenses committed with a dangerous weapon.** (1) A person who has been found guilty of any offense and who, while engaged in the commission of the offense, knowingly displayed, brandished, or otherwise used a firearm, destructive device, as defined in 69-1931(1), or other dangerous weapon shall, in addition to the punishment provided for the commission of such offense, be sentenced to a term of

imprisonment in the state prison of not less than 2 years or more than 10 years, except as provided in 95-2206.18.

(2) A person convicted of a second or subsequent offense under this section shall, in addition to the punishment provided for the commission of the present offense, be sentenced to a term of imprisonment in the state prison of not less than 4 years or more than 20 years, except as provided in 95-2206.18. For the purposes of this subsection, the following persons shall be considered to have been convicted of a previous offense under this section:

(a) a person who has previously been convicted of an offense, committed on a different occasion than the present offense, under 18 U.S.C. 924(c); and

(b) a person who has previously been convicted of an offense in this or another state, committed on a different occasion than the present offense, during the commission of which he knowingly displayed, brandished, or otherwise used a firearm, destructive device, as defined in 69-1931(1), or other dangerous weapon.

(3) The imposition or execution of the minimum sentences prescribed by this section may not be deferred or suspended, except as provided in 95-2206.18.

**History:** En. 95-2206.17 by Sec. 13, Ch. 584, L. 1977.

#### **Title of Act**

An act to require mandatory minimum prison sentences for certain violent and drug-related crimes and for any crime committed with a dangerous weapon without the option of deferred imposition or suspension of execution of the sentence; to

provide for limited exceptions to mandatory sentences and restrictions on deferred imposition and suspended execution of sentence; and to require a hearing to determine the applicability of the exceptions; amending sections 54-132, 54-133, 54-133.1, 94-5-102, 94-5-103, 94-5-202, 94-5-302, 94-5-303, 94-5-401, 94-5-503, 95-1507, and 95-2206, R. C. M. 1947; and providing an effective date.

**95-2206.18. Exceptions to mandatory minimum sentences and restrictions on deferred imposition and suspended execution of sentence.** All mandatory minimum sentences prescribed by the laws of this state and the restrictions on deferred imposition and suspended execution of sentence prescribed by 95-1507(4), 95-2206(4), and subsection (3) of 95-2206.17 do not apply if:

(1) the defendant was less than 18 years of age at the time of the commission of the offense for which he is to be sentenced;

(2) the defendant's mental capacity, at the time of the commission of the offense for which he is to be sentenced, was significantly impaired, although not so impaired as to constitute a defense to the prosecution;

(3) the defendant, at the time of the commission of the offense for which he is to be sentenced, was acting under unusual and substantial duress, although not such duress as would constitute a defense to the prosecution;

(4) the defendant was an accomplice, the conduct constituting the offense was principally the conduct of another, and the defendant's participation was relatively minor; or



(5) where applicable, no serious bodily injury was inflicted on the victim.

History: En. 95-2206.18 by Sec. 14, Ch. 584, L. 1977.

**95-2206.19. Hearing to determine application of exceptions.** (1) When the application of an exception provided for in 95-2206.18 is an issue, the court shall grant the defendant a hearing prior to the imposition of sentence to determine the applicability of the exception.

(2) The hearing shall be held before the court sitting without a jury. The defendant and the prosecution are entitled to assistance of counsel, compulsory process, and cross-examination of witnesses who appear at the hearing.

(3) If it appears by a preponderance of the information, including information submitted during the trial, during the sentencing hearing, and in so much of the presentence report as the court relies on, that none of the exceptions at issue apply, the court shall impose the appropriate mandatory sentence. The court shall state the reasons for its decision in writing and shall include an identification of the facts relied upon in making its determination. The statement shall be included in the judgment.

History: En. 95-2206.19 by Sec. 15, Ch. 584, L. 1977.

#### Effective Date

Section 16 of Ch. 584, Laws 1977 read "This act is effective on January 1, 1978."

### 95-2207. Withdrawal of plea on a deferred imposition.

#### Intent of Legislature

The passage of this section demonstrates the intent of the legislature in regard to deferred imposition of sentence; if sentence were imposed or executed in any

part, then the end advantage to the entire concept of the deferred sentence could not be attained and this section would become inoperative. *State v. Drew*, 158 M 214, 490 P 2d 230.

### 95-2211. Repealed.

#### Repeal

Section 95-2211 (Sec. 1, Ch. 196, L. 1967), relating to review of sentences,

was repealed by Sec. 64, Ch. 184, Laws 1977.

**95-2213. Merger of sentences.** (a) Unless the judge otherwise orders, (1) when a person serving a term of commitment imposed by a court in this state is committed for another offense, the shorter term or shorter remaining term shall be merged in the other term, and (2) when a person under suspended sentence or on probation for an offense committed in this state is sentenced for another offense, the period still to be served on suspended sentence or probation shall be merged in any new sentence of commitment or probation.

(b) to (d) \* \* \* [Same as parent volume.]

(e) Except as provided in this subsection, when a prisoner is sentenced for an offense committed while he was imprisoned in the state prison or while he was released on parole or under the prisoner furlough program, the new sentence runs consecutively with the remainder of the original sentence. The prisoner starts serving the new sentence when the

original sentence has expired or when he is released on parole under 95-3214 in regard to the original sentence, whichever is sooner. In the latter case, the sentences run concurrently from the time of his release on parole.

**History:** En. 95-2213 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 2, Ch. 340, L. 1977.

#### **Amendments**

The 1977 amendment deleted "or parole" after "probation" in two places in subsection (a); and added subsection (e).

#### **Concurrent Sentence Unless Specified**

Under this section, if district court does not specify whether sentence is to run concurrently or consecutively, it will run concurrently with any prior commitment. *Petition of Parrett*, 154 M 257, 459 P 2d 268.

### **95-2215. Credit for incarceration prior to conviction.**

#### **Credit for Time Served upon Reinstated Sentence**

Prison time previously served as a condition of deferment of sentence must be credited against the prison term imposed upon revocation of petitioner's deferred imposition of sentence; defendant convicted of crime of possession of dangerous drugs, who served four months in the state prison to fulfill condition for deferred imposition of sentence, was, during the four months, incarcerated on a bailable offense. *State ex rel. Bovee v. District Court, Sixth Judicial Dist., Park County*, — M —, 508 P 2d 1056.

Person convicted and given suspended sentence after service of a term in the county jail, prior to the amendment of 95-2206 in 1973, was entitled to credit for post-conviction jail time already served when suspension of sentence was later revoked. *Matter of LeDesma*, — M —, 554 P 2d 751.

#### **Credit on Deferred Imposition of Sentence**

Period of confinement in county jail was not credited to period of deferred imposition of sentence since a deferred imposition of sentence is not a judgment of imprisonment. *Petition of Gray*, — M —, 517 P 2d 351.

Where defendant was held in county jail for 31 days in lieu of bail prior to trial and was sentenced to term of probation and less than 31 days before expiration of three-year term of probation,

petition for revocation of probation was filed and defendant was sentenced to long term of imprisonment, defendant's contention that he was entitled to credit of 31 days preconviction jail time on probationary order and that Montana state court had lost jurisdiction was without merit, since probation is not "a judgment of imprisonment" and preconviction jail time credit is of legislative grace and not a constitutional guarantee. *Gray v. Warden of Montana State Prison*, 523 F 2d 989.

#### **Prior Incarceration in Other States**

This statute has application only to Montana offenses and sentences, and has no application to time served in prisons or jails of other states. *Petition of Woods*, — M —, 535 P 2d 173.

#### **Retroactive Application**

This section did not apply to prisoner who was sentenced after effective date of this section for crime committed prior to such effective date. *Petition of Wilson*, 154 M 508, 463 P 2d 469.

#### **Work Release Confinement**

Where defendant had been confined under county jail work release program as condition of continuation of deferred sentence, he was entitled to credit for time in such jail upon revocation of deferment and imposition of sentence. *Maldonado v. Crist*, — M —, 510 P 2d 887.

**95-2217. Prisoner furlough program—purpose and intent.** The purpose and intent of this act is to establish a program for the rehabilitation, education, and betterment of selected prisoners confined in the state prison; to increase their responsibility to society; to make it possible that they may, while serving their sentences, work gainfully to support their dependents in whole or in part; and providing for the minimum hourly wage required by law or the prevailing rate of pay for persons employed in similar occupations by the same employer to be paid to said convicts while so employed; continue their education or training; and at the same time

fulfill the obligations of the sentence of imprisonment imposed; placing the establishment, regulation, guidance, and control of such program under the direction of the department of institutions. The prisoner program shall operate by supplementing and not replacing established penal procedures now or hereafter established by law and shall serve to extend the limits of confinement for treatment as well as jurisdictional purposes. This act is to be liberally construed to effect the over-all objectives set forth above.

**History:** En. Sec. 1, Ch. 288, L. 1969; amd. Sec. 1, Ch. 496, L. 1975.

#### Amendments

The 1975 amendment substituted "the minimum hourly wage required by law or the prevailing rate of pay for persons employed in similar occupations by the same employer" for "a minimum wage of one and 40/100 (\$1.40) dollars an hour";

substituted "department of institutions. The prisoner" for "warden of the state prison with the advice and consent of the state board of pardons, which" at the end of the first sentence; and added "and shall serve to extend the limits of confinement for treatment as well as jurisdictional purposes" at the end of the second sentence.

**95-2218. Definitions.** Unless the context requires otherwise, in this act:

(1) "Department" means the department of institutions provided for in section 82A-801;

(2) "Board" means the board of pardons provided for in section 82A-804.

(3) "State prison" means the Montana state prison at Deer Lodge and any adult correctional facility under the direction of the department;

(4) "Prisoner" means a person sentenced by a district court to a term of confinement in the state prison;

(5) "Supervising agency" means any federal, state, county, local or private agency, Indian tribe and reservation, or any person, group, association or organization approved by the department to undertake the supervision of prisoners participating in the furlough program;

(6) "Jail" means any county jail or tribal jail;

(7) "Applicant" means any prisoner who has signed an application to participate in the prisoner furlough program.

**History:** En. Sec. 2, Ch. 288, L. 1969; amd. Sec. 92, Ch. 120, L. 1974; amd. Sec. 2, Ch. 496, L. 1975.

#### Amendments

The 1974 amendment added "provided for in section 82A-804" to subdivision (1); and made minor changes in phraseology and punctuation.

The 1975 amendment inserted subdivision (1); redesignated former subdivisions

(1) to (5) as (2) to (6); deleted "state" before "board of pardons" in subdivision (2); added "and any adult correctional facility under the direction of the department" at the end of subdivision (3); substituted the definition of "supervising agency" in subdivision (5) for the former definition of "sheriff"; added "or tribal jail" at end of subdivision (6); and added subdivision (7).

**95-2219. Department to establish program and rules.** The department is authorized and directed to establish a furlough program and rules to implement and control the same. Rules shall include provisions for:

(1) Working at paid employment for a rate of pay not less than the minimum hourly wage as required by law or the prevailing rate of pay for persons employed in similar occupations by the same employer;



- (2) Participating in an educational, treatment, or training program;
- (3) Approval of supervising agency; and
- (4) Review of determinations in furlough application.

**History:** En. Sec. 3, Ch. 288, L. 1969; amd. Sec. 3, Ch. 496, L. 1975.

#### Amendments

The 1975 amendment substituted "department" for "warden" at the beginning of the section; substituted "Rules shall include provisions for" for "A prisoner sentenced to the state prison may be granted the privilege of" at the beginning of the second sentence; substituted "the

minimum hourly wage as required by law or the prevailing rate of pay for persons employed in similar occupations by the same employer" for "a rate of pay not less than one and 40/100 (\$1.40) dollars an hour" in subdivision (1); inserted "treatment" before "or training" in subdivision (2); added subdivisions (3) and (4); and made minor changes in punctuation.

**95-2220. Application for participation in furlough program.** Any prisoner confined in the state prison except a prisoner serving a sentence imposed under 95-2206(3)(b), may make application to participate in the furlough program at least by the time the inmate has served one-half of the time required to be considered for parole.

**History:** En. Sec. 4, Ch. 288, L. 1969; amd. Sec. 4, Ch. 496, L. 1975; amd. Sec. 2, Ch. 580, L. 1977.

#### Amendments

The 1975 amendment substituted "at least by the time the inmate has served one-half ( $\frac{1}{2}$ ) of the time required to be

considered for parole" for "according to rules adopted by the warden with the advice and consent of the board."

The 1977 amendment inserted "except a prisoner serving a sentence imposed under 95-2206(3)(b)"; and made a minor change in style.

**95-2221. Consideration of application—furlough plan—notification or consent of sheriff necessary—duties of board.** (1) At the meeting of the board following the signing of any prisoner's application the board shall approve or deny the application of each prisoner after careful study of the prisoner's furlough plans, criminal history, and all other pertinent case material. The following rules shall be observed when the board meets to consider an application:

(a) each applicant may call two (2) witnesses from outside or inside the institution to testify as to the applicant's general attitude, participation in self-help activities, or his character or job references;

(b) an applicant may remain present during the board proceedings on his application; however, the board may meet in executive session without the applicant for final decision on the application;

(c) the board shall cause the applicant to be notified of its decision immediately and shall provide the applicant with a written decision including a thorough statement of the reasons for the decision within two (2) days following adjournment;

(d) each applicant shall be viewed singly, and shall be recognized as an individual;

(e) each applicant shall be allowed to discuss any specific problem areas with any member of the board.

(2) If the application is approved, the department shall, within the shortest possible time, locate an agency capable of supervising the applicant.

(3) The supervising agency, the department, and the applicant shall enter into a written agreement setting out the conditions and purposes of the furlough and specifying the responsibility assumed by each of the parties. The agreement shall be executed, signed by the parties before a notary public, in triplicate, with one copy to be filed with the supervising agency and the department and one copy to be retained by the applicant.

(4) Upon the signing of the agreement, the prisoner shall be released to the supervising agency.

(5) Final authority in all matters pertaining to prisoner furloughs is in the department.

(6) When an inmate is to reside in the county or tribal jail, the consent of the sheriff or tribal chief of police in the receiving county or reservation is necessary. However, when the inmate is to reside in a community corrections center or some other supervised setting the sheriff or tribal chief of police of the receiving county or reservation shall be notified.

(7) If the application is denied the prisoner may reapply after six (6) months' time. After an applicant has been denied three (3) times he may appeal to the department for a hearing.

**History:** En. Sec. 5, Ch. 288, L. 1969;  
amd. Sec. 5, Ch. 496, L. 1975.

#### Amendments

The 1975 amendment inserted "At the meeting of the board following the signing of any prisoner's application" at the beginning of the section; deleted "conduct, attitude and behavior in the prison in which the prisoner is confined" after "study of the prisoner's" in subsection (1); inserted "furlough plans" before "criminal history" in subsection (1); inserted

the introductory phrase and subdivisions (1)(a) to (e); substituted present subsection (2) for "If the application is approved, the warden shall adopt a furlough plan for the prisoner, which shall constitute an extension of the limits of confinement"; substituted present subsection (3) for "No prisoner shall be released without the written consent of the sheriff of the county receiving the prisoner"; added subsections (4) to (7); and made minor changes in phraseology.

**95-2222. Disposition of prisoner's earnings—trust fund—schooling costs.** (1) A prisoner employed in the community under a work furlough plan shall enter into a written financial agreement with the supervising agency and the department concerning the acquisition and disposition of his earnings. This financial agreement shall provide for the payment of:

(a) A standard charge for providing food, lodging and clothing for the prisoner if incurred and if applicable;

(b) The actual and necessary travel and other expenses of the prisoner under furlough from actual confinement under the program;

(c) An amount to pay for the support of his dependents, which amount shall be paid to the dependents; and

(d) An allowance for personal items, and other expenses or disbursements agreed upon by the prisoner and the supervising agency.

(2) Unless the financial agreement specifically provides for other disbursement of the money, any balance remaining after deductions and payments shall be deposited to an interest-bearing account held in trust for the prisoner and shall be paid to him upon release.

(3) If no other sources of support are available, the costs of a prisoner under furlough who is in training or school shall be the responsibility of the state.

**History:** En. Sec. 6, Ch. 288, L. 1969; amd. Sec. 6, Ch. 496, L. 1975.

#### Amendments

The 1975 amendment substituted the present provision for financial agreement in subsection (1) for a former provision that the prisoner's earnings be surrendered to the sheriff; substituted "a standard charge for providing food" for "a standard charge for all prisoners determined by the county commissioners to be the cost to the county of providing food" in subsection (1)(a); added "if incurred and if applicable" at the end of subsection (1)

(a); substituted in subdivision (c) "An amount to pay for the support of his dependents" for "Such amount as the prisoner may be determined by the district judge to pay for the support of his dependents"; deleted "minimal" before "allowance" in subsection (d); added the last part of the sentence in subdivision (d); inserted "Unless the financial agreement specifically provides for other disbursement of the money" at the beginning of subsection (2); inserted "If no other sources of support are available" at the beginning of subsection (3); and made minor changes in style and phraseology.

**95-2223. Administrative rules—co-operation by state agencies.** (1) The department is authorized to make rules for the administration of the provision of this act in accordance with Title 82, chapter 42, R. C. M. 1947.

(2) All state, county and local agencies shall be encouraged to co-operate in the administration of the furlough program.

**History:** En. Sec. 7, Ch. 288, L. 1969; amd. Sec. 7, Ch. 496, L. 1975.

#### Amendments

The 1975 amendment substituted "department" for "warden" at the beginning of the section; substituted "in accordance

with Title 82, chapter 42, R. C. M. 1947" for "with the advice and consent of the board" in subsection (1); inserted "county and local" in subsection (2); substituted "shall be encouraged to co-operate" for "shall co-operate with the warden and sheriff" in subsection (2).

**95-2224. Prisoner not agent or involuntary servant.** No prisoner in the community under the provisions of this act may be considered to be an agent or involuntary servant of the department or of the supervising agency while released from confinement pursuant to the terms of the furlough program. Abuse of authority over a prisoner is official misconduct punishable as provided in 94-7-401.

**History:** En. Sec. 8, Ch. 288, L. 1969; amd. Sec. 8, Ch. 496, L. 1975; amd. Sec. 39, Ch. 184, L. 1977.

#### Amendments

The 1975 amendment deleted "employed" after "prisoner" at the beginning of the

section; deleted "employee" after "agent"; substituted "department or of the supervising agency" for "warden or sheriff"; and added the second sentence.

The 1977 amendment made minor changes in phraseology, punctuation and style.

### 95-2226. Repealed.

#### Repeal

Section 95-2226 (Sec. 10, Ch. 288, L. 1969; Sec. 93, Ch. 120, L. 1974), relating to the responsibility of the sheriff in

cancellation or revocation of furlough of a convicted person, was repealed by Sec. 11, Ch. 496, Laws 1975.

**95-2226.1. Responsibility of department and supervising agency—change or revocation of furlough—escape.** (1) The department shall be responsible for the activities of a prisoner participating in a furlough program under this act. The department may delegate jurisdictional supervision of work furlough participants to the adult parole and probation field service. The supervising agency shall be responsible for those activities of a furloughed prisoner for which it is responsible in the written furlough agreement.



(2) If any prisoner released from actual prison confinement under the furlough program fails to comply with the rules and regulations of the furlough agreement, he shall be called by the department or by the supervising agency to appear before the department or supervising agency. If a conference is not sufficient to resolve the situation and if the prisoner continues in his noncompliance, the prisoner shall be granted a hearing on the violation within a reasonable time on or near the site of the alleged violation to determine whether a violation of the furlough agreement exists. The prisoner is entitled to have counsel appointed to represent him at the hearing. The hearing shall be conducted by a hearing officer of the board of pardons. The prisoner on furlough shall have all opportunities provided under section 95-3220, R. C. M. 1947, pertaining to on-site hearings for parole revocation. If reasonable grounds are established for violation of the furlough agreement, the furlough shall be canceled and the prisoner shall be returned to the prison. At the next meeting of the board of pardons after the return of the prisoner to the prison, the prisoner shall be granted a due process hearing in order to determine if the prisoner has, in fact, violated the terms of the prisoner's furlough release. If it is determined that the prisoner has, in fact, violated the terms of the prisoner's furlough, the prisoner shall remain at the prison. If the terms of the prisoner's release have not been violated, the prisoner's case shall be assigned to a parole agent and a new furlough arrangement shall be worked out.

(3) If the department determines after having been advised by the supervising agency or the adult parole and probation field service, that a prisoner presents an immediate grave threat to the community in which he is furloughed, it may order the prisoner returned to prison before a hearing is held, but in this case a hearing on the charges against the prisoner, as provided for in the above subsection, must be held by the board no later than thirty (30) days after the return of the prisoner to the state prison.

(4) If, after a reasonable time, a furloughed prisoner determines that his furlough plan is unsatisfactory due to personality conflict, a violation of his rights by his supervisor, or a change of interest or employment status, the department shall grant him a hearing to determine whether or not a new furlough plan should be executed.

(5) If a prisoner, while not "disabled from working by temporary illness, is unemployed for a period of thirty (30) days, or more, after his availability for employment is reported in writing by the supervising agency to the department of labor and industry office serving the area in which the prisoner is furloughed and to any union to which the prisoner belongs, or if a prisoner has become so disabled as to be unemployable, or if a prisoner is on an educational furlough and has demonstrated for a period of six (6) weeks or more that he is unable to benefit from schooling, treatment, or training, then the prisoner, the department, or the supervising agency may request that a conference be held with the department, the prisoner, and a representative of the supervising agency to consider the problem of the prisoner's unemployment, disability, or inability to benefit from schooling or training. At this conference the prisoner may request that supervision be transferred to another supervising agency, and a repre-

sentative of the new agency may be at the conference. If the conference does not result in a resolution of the problem of the prisoner's unemployment, disability, or inability to benefit, the department may request a hearing by the board of pardons to determine an alternate proposal. In this hearing the prisoner is entitled to have counsel appointed to represent him. Upon determining that the prisoner is not benefiting from the furlough program and will not benefit from continued participation in the program, the board shall order the prisoner returned to the prison.

(6) For the purpose of this act, the provisions relating to escape in section 94-7-306, R. C. M. 1947, shall apply, unless aggravating circumstances require a more severe penalty.

**History:** En. 95-2226.1 by Sec. 9, Ch. 496, L. 1975.

#### **Title of Act**

An act to amend the prisoner furlough program providing for supervision of prisoners by public and private supervising agencies, and placing responsibility for the program with the department of institutions by amending sections 82-4202, 95-2217 through 95-2224, R. C. M. 1947, and repealing section 95-2226, R. C. M. 1947.

#### **Separability Clause**

Section 10, Ch. 496, Laws 1975 read "If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications."

#### **Repealing Clause**

Section 11, Ch. 496, Laws 1975 read "Section 95-2226, R. C. M. 1947, is repealed."

### **DECISIONS UNDER FORMER LAW**

#### **Parole Violation**

Former section 95-2226 did not apply to prisoner released on parole but not on furlough, and prisoner was not entitled

to counsel as a matter of right at hearing on parole violation. *Petition of Osier*, 156 M 165, 477 P 2d 344.

**95-2227. Effect of conviction.** (1) Conviction of any offense shall not deprive the offender of any civil or constitutional rights except as they shall be specifically enumerated by the sentencing judge as necessary conditions of the sentence directed toward the objectives of rehabilitation and the protection of society.

(2) No person shall suffer any civil or constitutional disability not specifically included by the sentencing judge in his order of sentence.

(3) When a person has been deprived of any of his civil or constitutional rights by reason of conviction for an offense and his sentence has expired or he has been pardoned he shall be restored to all civil rights and full citizenship, the same as if such conviction had not occurred.

**History:** En. 95-2227 by Sec. 9, Ch. 513, L. 1973.

### **DECISIONS UNDER FORMER LAW**

#### **Inheritance by Slayer From Decedent**

Wife who unlawfully killed husband could not take from his estate by dower or intestate succession, nor take his share

in jointly owned property, but rather she became constructive trustee for other beneficiaries and devisees. *Sikora v. Sikora*, 160 M 27, 499 P. 2d 808.

**95-2228. Fines, costs and forfeitures, how disposed of.** All fines and forfeitures collected in any court, except police courts, must be applied

to the payment of the costs of the case in which the fine is imposed or the forfeiture incurred; and after such costs are paid, the residue, if not otherwise provided by law, must be paid to the county treasurer of the county in which the court is held and by him credited as provided by law. If the said fine or forfeiture is paid to the county treasurer at the time of such payment there shall be filed with the county treasurer, a complete statement showing the total of the fine or forfeiture received or incurred with an itemized statement of the costs incurred by the county in such action, which statement shall give the title of the cause and be subscribed by the person or officer making such payment.

History: En. 95-2228 by Sec. 10, Ch. 513, L. 1973.

**95-2229. Disposition of traffic fines collected from juveniles.** All fines collected by the district courts from children under 18 years of age for unlawful operation of motor vehicles as the result of traffic summonses issued by peace officers of cities or counties or by highway patrolmen, together with that portion of the fines which is specified in 75-7903, shall be retained by the county treasurer of the county in which the offense occurred and at the end of each month distributed as follows:

(1) Fines collected as the result of summonses issued by city peace officers shall be distributed to the city in which the peace officer is employed and credited to the city general fund.

(2) Fines collected as the result of summonses issued by county peace officers shall be retained by the county treasurer and credited to the county road fund.

(3) Fines collected as the result of summonses issued by state highway patrolmen shall be paid to the state treasurer of Montana, who shall credit them to the general fund of the state.

(4) That portion of the fines which is specified in 75-7903 shall be paid to the state treasurer of Montana, who shall credit it to the automobile driver education account in the earmarked revenue fund.

History: En. 95-2229 by Sec. 11, Ch. 513, L. 1973; amd. Sec. 40, Ch. 184, L. 1977.      **Amendments**  
The 1977 amendment made minor changes in phraseology, punctuation and style.

## CHAPTER 23—EXECUTION OF SENTENCE

### Section

95-2305. Proceedings upon finding of lack of mental fitness.

95-2311. Hearings requested by other states—power of board of pardons and department of institutions to hold.

**95-2305. Proceedings upon finding of lack of mental fitness.** If it is found that defendant is mentally fit as provided in section 95-2304, the sheriff must execute the judgment; but if it is found that he lacks fitness, the execution of judgment must be suspended and the court shall commit him to the custody of the superintendent of Warm Springs state hospital, to be placed in an appropriate institution of the department of institutions



for so long as the lack of fitness endures. When the court, on its own motion or upon application of the superintendent of Warm Springs state hospital, or the county prosecuting officer, or the defendant or his legal representative, determines after a hearing if a hearing is requested, that the defendant has regained fitness to proceed, the sheriff shall be directed by the court to carry out the execution. If, however, the court is of the view that so much time has elapsed since the commitment of the defendant, that it would be unjust to proceed with execution of the sentence, the court may suspend the execution of the sentence and may order the defendant to be discharged.

**History:** En. 95-2305 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 94, Ch. 120, L. 1974.

#### **Amendments**

The 1974 amendment substituted "Warm Springs state hospital" for "Montana state

hospital" in the first and second sentences; substituted "department of institutions" for "state department of public institutions" in the first sentence; and made minor changes in phraseology and punctuation.

**95-2311. Hearings requested by other states—power of board of pardons and department of institutions to hold.** The board of pardons and the department of institutions shall hold such hearings as may be requested by any other party state pursuant to section 95-2308, subsection 4 (f) of the Western Interstate Corrections Compact.

**History:** En. 95-2311 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 95, Ch. 120, L. 1974.

#### **Amendments**

The 1974 amendment substituted "board of pardons" for "board of pardons and paroles"; substituted "department of institutions" for "state department of institutions"; and made minor changes in phraseology.

#### **Repealing Clause**

Section 96 of Ch. 120, Laws 1974 read "Sections 38-108(1), 38-117, 38-119, 38-406.1, 69-6402, 80-1404, 80-1407 through 80-1409, 80-2207, 80-2311, 80-2601 through 80-2603, 82-903, 82A-802, 82A-803, 82A-807, 94-3208, 94-9851, R. C. M. 1947, are repealed."

## **CHAPTER 24—APPEAL BY STATE AND DEFENDANT**

### **Section**

- 95-2403. Scope of appeal by state.  
95-2426. Action reviewing court may take.

### **95-2401. Application of chapter.**

#### **Petition for Writ to Dismiss**

Remedy of original petition for writ to dismiss criminal action was not available on grounds of double jeopardy, after motion for mistrial had been granted over

the objection of the defendant and cause had been set for new trial, since the only review in criminal cases is by notice of appeal. State ex rel. LaFlesch v. District Court, — M —, 529 P 2d 1403.

### **95-2402. Suspension of the rules.**

#### **Mistrial**

The remedy of a criminal defendant lies in an appeal following his conviction, or in a post-conviction proceeding except where the writ of habeas corpus is applicable, and the supreme court will not

suspend the rule to consider the validity of the granting of a motion for mistrial, but the defendant must proceed in accordance with the rules to secure a prompt and fair trial. State ex rel. LaFlesch v. District Court, — M —, 529 P 2d 1403.

**95-2403. Scope of appeal by state.** (1) Except as otherwise specifically authorized, the state may not appeal in a criminal case.

(2) The state may appeal from any court order or judgment the substantive effect of which results in:

- (a) dismissing a case;
- (b) modifying or changing the verdict as provided in 95-2101(2)(c) (iii);
- (c) granting a new trial;
- (d) quashing an arrest or search warrant;
- (e) suppressing evidence;
- (f) suppressing a confession or admission; or
- (g) granting or denying change of venue.

**History:** En. 95-2403 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 41, Ch. 184, L. 1977.

#### **Amendments**

The 1977 amendment made minor changes in phraseology, punctuation and style.

### **95-2404. Scope of appeal.**

#### **Guilty Plea**

The issue of suppression of evidence is a matter of defense at trial and may become an issue upon appeal; but where a guilty plea has been entered the defendant is convicted upon his plea of guilt and not upon the evidence. *State v. Turcotte*, — M —, 524 P 2d 787.

#### **Mistrial**

Remedy of original petition for writ to dismiss criminal action was not available on grounds of double jeopardy, after motion for mistrial had been granted over the objection of the defendant and cause

### **95-2405. Procedure on appeal.**

#### **Copy of Transcript**

Where indigent prison inmate's 60 days for appeal had expired, he could not get copy of trial and court record transcript. *Ketcham v. State*, — M —, 541 P 2d 68.

### **95-2408. The record on appeal.**

#### **Furnishing Transcript**

Where nonindigent defendant petitioned court for order for official court reporter to supply him with one original copy of transcript of his trial and allow defendant to supply additional copies required for appeal, court held that court reporter must furnish all copies, because court reporter is required to certify correctness of each copy of transcript. *State v. Merseal*, — M —, 538 P 2d 1364.

#### **Interlocutory Orders**

State may appeal from interlocutory order; such appeals are governed by this chapter. *State v. Bergum*, — M —, 520 P 2d 653.

had been set for new trial, since there had been no final judgment. *State ex rel. LaFlesch v. District Court*, — M —, 529 P 2d 1403.

#### **Question of Law**

Contention by appellant that he was improperly sentenced for violation of Dangerous Drug Act due to lack of evidence necessary to overcome presumption regarding sentencing of persons 21 years old or under was clearly legal question properly addressed to supreme court. *State v. Simtob*, 154 M 286, 462 P 2d 873.

#### **Interlocutory Orders**

Appeal from interlocutory order filed fifty-five days after entry of order was timely. *State v. Bergum*, — M —, 520 P 2d 653.

#### **Partial Transcript**

The purpose of the provision of subsection (b) of this section requiring a statement of issues appellant intends to raise upon appeal when a partial transcript is requested is to notify the court and opposing counsel what parts of the record will be pertinent to the appeal; therefore, failure to include such a statement will render defective a motion for a partial transcript. *State v. Anderson*, — M —, 557 P 2d 795.

**95-2412. Ruling against respondent may be reviewed.****Harmless Error**

Instructing jury on assault by willfully inflicting grievous bodily harm when defendant had been charged with assault with intent to prevent or resist his law-

ful detention or apprehension was harmless error where the evidence conclusively demonstrated defendant's guilt of the offense charged. *State v. Jones*, 161 M 117, 505 P 2d 97.

**95-2425. Substantial and insubstantial errors on appeal.****Comments on Defendant's Past Record**

Statement by prosecuting attorney in closing argument that the perpetrators of the crime were "thick as thieves" was not construed as a comment on the past record of the defendant but merely as an argument that the defendant was guilty of the robbery of which he was charged in that prosecution and did not affect any substantial right of the defendant. *State v. Romero*, 161 M 333, 505 P 2d 1207.

Remarks of prosecutor referring to the defendant's association with the drug culture, although offensive, were reasonably founded on the testimony and evidence, and such remarks did not deny the defendant a fair trial. *State v. Flamm*, — M —, 526 P 2d 119.

**Jury Instructions**

Instructing jury on assault by willfully inflicting grievous bodily harm when defendant had been charged with assault with intent to prevent or resist his lawful detention or apprehension was harmless error where the evidence conclusively demonstrated defendant's guilt of the offense charged. *State v. Jones*, 161 M 117, 505 P 2d 97.

**Remark in the Presence of Jurors**

A statement of opinion, made in the presence of other jurors by a prospective juror who was never seated, that she was convinced that the defendants were guilty, was not a sufficient showing of prejudice to require a new trial. *State v. Rhodes*, — M —, 524 P 2d 1095.

**Technical Errors—Jury Participation**

Prosecuting attorney's invitation to a juror to participate in an experiment not supported by the evidence was harmless error, where the juror did not participate, and the court immediately sustained the defendant's objection. *State v. Thompson*, — M —, 524 P 2d 1115.

**Technical Errors—Witness's Remarks**

Where trial court on defendant's motion directed state's witnesses not to reveal victim's pregnancy, fact that one witness mentioned the pregnancy to jury did not provide basis for mistrial, since no substantial right was affected. *State v. Bentley*, 155 M 383, 472 P 2d 864.

**95-2426. Action reviewing court may take.** On appeal the reviewing court may:

- (1) reverse, affirm, or modify the judgment or order from which the appeal is taken;
- (2) set aside, affirm, or modify any or all of the proceedings subsequent to or dependent upon the judgment or order from which the appeal is taken;
- (3) reduce the offense of which the appellant was convicted to a lesser included offense;
- (4) reduce the punishment imposed by the trial court; or
- (5) order a new trial if justice so requires.

**History:** En. 95-2426 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 42, Ch. 184, L. 1977.

**Amendments**

The 1977 amendment made minor changes in phraseology, punctuation and style.

**95-2428. Indigent appeals.****Determining Financial Need**

It would have been unconscionable to permit proceeding in forma pauperis by petitioner whose income for previous year was \$13,000 and who had house, vehicles

and furniture worth over \$11,000, even though petitioner had only a small bank balance and owed over \$800 in taxes. *Petition of Allen*, 156 M 163, 476 P 2d 510.



CHAPTER 25—APPELLATE REVIEW OF LEGAL SENTENCES

95-2503. Review—decision.

Questions Reviewable

Review division established by this chapter provides appellate review of "legal" sentences and therefore could not review contention by defendant that his sentence under Dangerous Drug Act was "illegal" under statutory presumption regarding sen-

tencing. *State v. Simtob*, 154 M 286, 462 P 2d 873.

Sentence Increase

Increase of sentence under this section did not constitute double jeopardy or denial of due process or equal protection of the laws. *State v. Henrich*, — M —, 509 P 2d 288.

CHAPTER 26—POST-CONVICTION HEARING

Section

- 95-2601. Circumstances in which validity of sentence may be challenged.
- 95-2604. When petition may be filed.
- 95-2605. Proceedings on the petition.
- 95-2606. Record must be kept.
- 95-2608. Review.

**95-2601. Circumstances in which validity of sentence may be challenged.** A person adjudged guilty of an offense in a court of record who has no adequate remedy of appeal and who claims that sentence was imposed in violation of the constitution or the laws of this state or the constitution of the United States, that the court was without jurisdiction to impose the sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack upon any ground of alleged error available under a writ of habeas corpus, writ of coram nobis, or other common law or statutory remedy may petition the court which imposed the sentence, the supreme court, or any justice of the supreme court to vacate, set aside, or correct the sentence.

**History:** En. 95-2601 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 43, Ch. 184, L. 1977.

vada, North Dakota, Oregon, South Carolina and South Dakota.

Amendments

The 1977 amendment made minor changes in phraseology, punctuation and style.

**NOTE.**—Uniform State Law. The following states have enacted the Uniform Post-Conviction Procedure Act: Arkansas, Idaho, Iowa, Maryland, Minnesota, Ne-

Mistrial

After motion for mistrial was granted, defendant's petition to supreme court for dismissal of subsequent trial on grounds of double jeopardy was dismissed, since defendant had not yet been adjudged guilty of any offense. *State ex rel. La-Flesch v. District Court*, — M —, 529 P 2d 1403.

**95-2604. When petition may be filed.** A petition for such relief may be filed at any time after conviction.

**History:** En. 95-2604 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 44, Ch. 184, L. 1977.

Amendments

The 1977 amendment substituted "petition" for "motion"; and substituted "filed" for "made."

**95-2605. Proceedings on the petition.** (1) Unless the petition and the files and records of the case conclusively show that the petitioner is entitled to no relief, the court shall cause notice thereof to be served upon the county attorney in the county in which the conviction took place,

grant a prompt hearing thereon, determine the issue, and make findings of fact and conclusions with respect thereto.

(2) The court may receive proof by affidavits, depositions, oral testimony, or other evidence. In its discretion the court may order the petitioner brought before the court for the hearing.

(3) If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings and such supplementary orders as to reassignment, retrial, custody, bail, or discharge as may be necessary and proper. If the court finds for the state, the petitioner shall be returned to the custody of the person to whom the writ was directed.

**History:** En. 95-2605 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 45, Ch. 184, L. 1977.

#### **Amendments**

The 1977 amendment inserted the sub-

section designations; substituted "petition" for "motion" and "petitioner" for "prisoner" in subsection (1); and made minor changes in punctuation.

**95-2606. Record must be kept.** A court which entertains a petition pursuant to this chapter must keep a record of the proceedings and enter its findings and conclusions.

**History:** En. 95-2606 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 46, Ch. 184, L. 1977.

#### **Amendments**

The 1977 amendment substituted "petition" for "motion."

**95-2608. Review.** Either the petitioner or the state may appeal to the supreme court of Montana from an order entered on the petition. The appeal must be taken within 6 months from the entry of the order.

**History:** En. 95-2608 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 47, Ch. 184, L. 1977.

#### **Amendments**

The 1977 amendment substituted "petition" for "motion" at the end of the first sentence; and made minor changes in phraseology and style.

## **CHAPTER 27—HABEAS CORPUS**

### **95-2701. Who may prosecute writ.**

#### **Indigent Prisoners**

Denial of trial transcript to an indigent prisoner does not violate his rights unless there has been some showing of need or a meritorious reason; denial of transcript did not deprive prisoner of his right

of access to courts where transcript was requested for purpose of searching for possible error on which to base a collateral attack on his sentence. Petition of Parker, — M —, 511 P 2d 973.

### **95-2713. Disposition of petitioner.**

#### **Return to Foreign Jurisdiction**

Montana courts were not the proper forum for petitioner to obtain release where he had been concurrently sentenced in Wyoming and Montana and by reason of the judgment of the Wyoming court

the warden of the Montana prison would not allow him to leave on parole unless he was taken to the Wyoming penitentiary to serve the balance of the term imposed there. Petition of Glover, — M —, 539 P 2d 721.

**95-2716. No release for technical defects.****Technical Defects**

Where court intended to vacate sentence to permit representation by counsel but said that it was vacating judgment, this

was a mere technical defect and would not form the basis for habeas corpus. Petition of Eldiwitw, 153 M 468, 457 P 2d 909.

**CHAPTER 28—IMPEACHMENT****Section**

- 95-2801. Officers liable to impeachment.  
 95-2802. Sole power of impeachment.  
 95-2803. Articles of impeachment.  
 95-2804 to 95-2817. [Transferred from Title 94.]  
 95-2819. [Transferred from Title 94.]

**95-2801. (11668) Officers liable to impeachment.** The governor, executive officers, heads of state departments, and judicial officers are liable to impeachment for felonies and misdemeanors or malfeasance in office.

**History:** Our present impeachment laws are substantially the same as the territorial acts which provided for trial by the council. See Secs. 41-62, pp. 196-199, Cod. Stat. 1871; re-en. as Secs. 41-62, 3d Div. Rev. Stat. 1879; re-en. as Secs. 41-63, 3d Div. Comp. Stat. 1887; re-en. Sec. 1500, Pen. C. 1895; re-en. Sec. 8972, Rev. C. 1907; re-en. Sec. 11668, R. C. M. 1921; Sec. 94-5401, R. C. M. 1947; amd. Sec. 2, Ch. 5, L. 1973; redes. 95-2801 by Sec. 29,

Ch. 513, L. 1973; amd. Sec. 29, Ch. 309, L. 1977. Cal. Pen. C. Sec. 737.

**Amendments**

The 1973 amendment substituted "executive officers, heads of state departments" for a reference to other state officers; deleted "except justices of the peace" following "judicial officers"; and substituted "felonies" for "high crimes."

The 1977 amendment made minor changes in phraseology and punctuation.

**95-2802. (11669) Sole power of impeachment.** The sole power of impeachment vests in the house of representatives; the concurrence of two-thirds ( $\frac{2}{3}$ ) of all the members being necessary to the exercise thereof. Impeachment shall be tried by the senate sitting for that purpose, and the senators shall be upon oath or affirmation to do justice according to law and evidence. When the governor or lieutenant-governor is on trial, the chief justice of the supreme court shall preside. No person shall be convicted without a concurrence of two-thirds of the senators elected.

**History:** En. Sec. 1501, Pen. C. 1895; re-en. Sec. 8973, Rev. C. 1907; re-en. Sec. 11669, R. C. M. 1921; Sec. 94-5402, R. C. M. 1947; amd. Sec. 1, Ch. 10, L. 1973; redes. 95-2802 by Sec. 29, Ch. 513, L. 1973.

**Amendments**

The 1973 amendment increased the vote in the house of representatives required by the first sentence from a majority to two-thirds of all members.

**95-2803. (11670) Articles of impeachment.** (1) All impeachments must be by resolution originated in and adopted by the house of representatives. The resolution shall be conducted through the house by managers elected by the house.

(2) The managers shall prepare articles of impeachment, present them at the bar of the senate, and prosecute them.

**History:** En. Sec. 1502, Pen. C. 1895; re-en. Sec. 8974, Rev. C. 1907; re-en. Sec. 11670, R. C. M. 1921; Sec. 94-5403, R. C. M. 1947; redes. 95-2803 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 30, Ch. 309, L. 1977. Cal. Pen. C. Sec. 738.



**Amendments**

The 1977 amendment divided the section into subsections; and made minor changes in phraseology and punctuation.

**Repealing Clause**

Section 31 of Ch. 309, Laws 1977 read "Sections 43-318, 43-511, 43-714, 43-719, 59-604, and 90-403, R. C. M. 1947, are repealed."

**95-2804 to 95-2817. [Transferred from Title 94.]****Compiler's Notes**

The sections were originally numbered 94-5404 to 94-5417. Section 29, Ch. 513, Laws of 1973, renumbered them to appear in this title. Because there has been no change in text, the sections are not reprinted here but may be found in bound Volume Eight as follows:

**New Sec.****Vol. 8**

95-2804	94-5404
95-2805	94-5405
95-2806	94-5406
95-2807	94-5407
95-2808	94-5408
95-2809	94-5409
95-2810	94-5410
95-2811	94-5411
95-2812	94-5412
95-2813	94-5413
95-2814	94-5414
95-2815	94-5415
95-2816	94-5416
95-2817	94-5417

**95-2819. [Transferred from Title 94.]****Compiler's Notes**

This section was originally numbered 94-5419. Section 29, Ch. 513, Laws of 1973, renumbered it to appear in this

title. Because there has been no change in the section, it is not reprinted here but may be found as sec. 94-5419 in bound Volume Eight.

**CHAPTER 29—PRESUMPTION OF INNOCENCE****Section**

95-2901. [Transferred from Title 94.]

95-2902. Reasonable doubt as to which offense convicts only of least offense.

**95-2901. (11971) Defendant presumed innocent—reasonable doubt.****Compiler's Notes**

This section was originally numbered 94-7203. Section 29, Ch. 513, Laws of 1973 renumbered it to appear here. Because there has been no change in text, the section is not reprinted here but may be found in bound Volume Eight as sec. 94-7203.

**Burden of Proof**

Jury instruction taken verbatim from section 94-2704.1 that stated that possession of recently stolen livestock is prima facie evidence of guilt of larceny did not constitute reversible error, since, even though state has burden of proof in criminal cases, the burden of evidence may shift to defendant. *State v. Gloyne*, 156 M 94, 476 P 2d 511.

**Circumstantial Evidence**

Conviction of defendant on charge of burglary in first degree on only circum-

stantial evidence consisting of ten rolls of half-dollars, three of which had been identified by store owner in front of witness, fact that defendant's father-in-law two weeks after burglary had deposited these rolls of half-dollars in bank after receiving them from defendant in payment of debt, and testimony by one witness that she had seen defendant in store two days before burglary, did not violate this section on grounds that evidence was insufficient to warrant conviction; burden of proof never shifts, but burden of evidence may shift frequently, and where all evidence is circumstantial, test is whether facts and circumstances are of such quality and quantity to support jury determination of guilt beyond reasonable doubt; fact alone that evidence is circumstantial is not sufficient grounds to justify reversal. *State v. Proctor*, 153 M 90, 454 P 2d 616.

**95-2902. (11972) Reasonable doubt as to which offense convicts only of least offense.** When it appears beyond a reasonable doubt that the defendant has committed an offense but there is reasonable doubt as to whether he is guilty of a given offense or one or more lesser included offenses, he may only be convicted of the greatest included offense about which there is no reasonable doubt.

**History:** Ap. p. Sec. 186, p. 245, Bannack Stat.; re-en. Sec. 307, p. 237, Cod. Stat. 1871; re-en. Sec. 308, 3d Div. Comp. Stat. 1887; en. Sec. 2073, Pen. C. 1895; re-en. Sec. 9274, Rev. C. 1907; re-en. Sec. 11972, R. C. M. 1921; Sec. 94-7204, R. C. M. 1947; redes. 95-2902 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 48, Ch. 184, L. 1977. Cal. Pen. C. Sec. 1097.

#### Amendments

The 1977 amendment rewrote this section which read: "When it appears that the defendant has committed a public offense, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of such degrees only."

### CHAPTER 30—EVIDENCE

#### Section

95-3001, 95-3002. [Transferred from Title 94.]

95-3004. Burden of the state in homicide trial.

95-3010. [Transferred from Title 94.]

95-3011. Competency of spouses.

95-3012. Testimony of person legally accountable.

#### 95-3001, 95-3002. [Transferred from Title 94.]

##### Compiler's Notes

These sections were originally numbered 94-7209 and 94-7210. Section 29, Ch. 513, Laws of 1973, renumbered them to appear in this title. Because there has been no change in text, the sections are not re-

printed here but may be found in bound Volume Eight as follows:

New Sec.	Vol. 8
95-3001	94-7209
95-3002	94-7210

**95-3004. Burden of the state in homicide trial.** (1) In a homicide trial, before an extrajudicial confession may be admitted into evidence, the state must introduce independent evidence tending to establish the death and the fact that the death was caused by a criminal agency.

(2) In a deliberate homicide, knowledge or purpose may be inferred from the fact that the accused committed a homicide and no circumstances of mitigation, excuse, or justification appear.

**History:** En. 95-3004 by Sec. 12, Ch. 513, L. 1973; amd. Sec. 49, Ch. 184, L. 1977.

#### Amendments

The 1977 amendment made minor changes in phraseology, punctuation and style.

### DECISIONS UNDER FORMER LAW

#### Mitigation

Stepfather charged with murder in beating death of his stepchild was entitled to instructions on voluntary and involuntary manslaughter in view of testimony that his striking the child was for disciplinary purposes and that he never intended to hurt her; since evidence relied

on by prosecution to establish guilt also tended to show circumstances of mitigation, defendant did not have burden of coming forth with proof of mitigation as prerequisite to instructions on lesser offense of manslaughter. *State v. Taylor*, — M —, 515 P 2d 695.

**95-3010. [Transferred from Title 94.]****Compiler's Notes**

This section was originally numbered 94-8801. Section 29, Ch. 513, Laws of 1973 renumbered it to appear in this

title. Because there has been no change in text, the section is not reprinted here but may be found in bound Volume Eight as sec. 94-8801.

**95-3011. (12176) Competency of spouses.** Except with the consent of both or in cases of criminal violence by one upon the other, abandonment or neglect of children by either party, or abandonment or neglect of one by the other, neither spouse is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties.

**History:** En. Sec. 2441, Pen. C. 1895; re-en. Sec. 9483, Rev. C. 1907; amd. Sec. 1, Ch. 111, L. 1915; re-en. Sec. 12176, R. C. M. 1921; Sec. 94-8802, R. C. M. 1947; redes. 95-3011 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 50, Ch. 184, L. 1977. Cal. Pen. C. Sec. 1322.

**Amendments**

The 1977 amendment substituted "one by the other" for "the wife by the husband"; substituted "spouse" for "husband nor wife"; and made minor changes in phraseology and punctuation.

**Neglect of Children**

Wife could testify against husband in homicide prosecution for alleged beating death of her child since such conduct amounted to "neglect" of child within this section; "neglect" includes any abuse of children whether inflicted negligently or intentionally; this section, rather than 93-701-4 (1), was applicable in determining any marital privilege. *State v. Taylor*, — M —, 515 P 2d 695.

**95-3012. Testimony of person legally accountable.** A conviction cannot be had on the testimony of one responsible or legally accountable for the same offense, as defined in 94-2-106, unless the testimony is corroborated by other evidence which in itself and without the aid of the testimony of the one responsible or legally accountable for the same offense tends to connect the defendant with the commission of the offense. The corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

**History:** En. 95-3012 by Sec. 13, Ch. 513, L. 1973; amd. Sec. 51, Ch. 184, L. 1977.

**Amendments**

The 1977 amendment made minor changes in phraseology, punctuation and style.

**Sufficiency of Corroborative Evidence**

Identification of defendants by pharmacist whose pharmacy had been robbed and by witnesses who observed defendants and their car fleeing the scene of the robbery

constituted sufficient independent corroboration of accomplice's testimony to support a conviction of robbery. *State v. Spielmann*, — M —, 516 P 2d 617.

In prosecution for aggravated assault, accomplice's testimony was sufficiently corroborated where part of it was undisputed and the victim of the assault identified defendant as the person who struck him with the weapon. *State v. Orsborn*, — M —, 555 P 2d 509, reaffirming *State v. Cobb*, 76 M 89, 245 P 265, decided under former 94-7220.

**DECISIONS UNDER FORMER LAW****Accomplice's Testimony Corroborated**

Testimony of accomplice to burglary was sufficiently corroborated by evidence that defendant owned car involved in burglary, had attended same party with other principals in burglary, was with other principals in grocery earlier on day of burglary, and admitted being in house where stolen property was discovered and

knew it was there. *State v. Dess*, 154 M 231, 462 P 2d 186.

In prosecution for second degree murder, accomplice's testimony that defendant had bludgeoned teen-age girl to death after the accomplice and the defendant had raped her was sufficiently corroborated by medical evidence that the girl had been raped, testimony of witnesses



who identified the coat which defendant had worn that night and upon which the FBI had found blood spots, and testimony of a friend of defendant that defendant had told her in the presence of another of the death of the girl. *State v. Perry*, 161 M 155, 505 P 2d 113.

#### Substantial Compliance

Habeas corpus was properly denied where extradition papers complied substantially with requisites of statute and defendant had waived extradition as con-

dition of his parole. *State v. Brackney*, — M —, 538 P 2d 21.

#### Who Is An Accomplice

Witness who was serving last two days of thirty-day sentence was not an accomplice where he neither acted voluntarily nor had any common intent with principals in attempted jailbreak; it was not necessary that his testimony be corroborated. *State v. Zuidema*, 157 M 367, 485 P 2d 952.

### CHAPTER 31—UNIFORM CRIMINAL EXTRADITION ACT

#### Section

- 95-3101. Definitions.
- 95-3102. Fugitives from justice—duty of governor.
- 95-3103. Demand—form.
- 95-3104. Investigation by governor.
- 95-3105. Extradition of persons imprisoned or awaiting trial in another state or who have left the demanding state under compulsion.
- 95-3106. Extradition of persons not present in demanding state at time of commission of crime.
- 95-3107. Issuance of warrant of arrest by governor—recitals therein.
- 95-3108. Execution of warrant—manner and place thereof.
- 95-3109. Authority of arresting officer.
- 95-3110. Rights of accused persons—habeas corpus.
- 95-3111. Penalty for noncompliance with preceding section.
- 95-3112. Confinement of accused in jail when necessary.
- 95-3113. Arrest of accused before making of requisition.
- 95-3114. Arrest of accused without warrant therefor.
- 95-3115. Commitment to await requisition—bail.
- 95-3116. Bail—in what cases—conditions of bond.
- 95-3117. Extension of time of commitment adjournment.
- 95-3118. Bail—when forfeited.
- 95-3119. Persons under criminal prosecution in this state at time of requisition.
- 95-3120. Guilt or innocence of accused, when inquired into.
- 95-3121. Alias warrant of arrest.
- 95-3122. Fugitives from this state—duty of governors.
- 95-3123. Application for issuance of requisition.
- 95-3124. Fugitives from this state—accounts.
- 95-3124.1. Expenses for returning fugitives.
- 95-3125. Restrictions on compensation for assisting return of fugitive.
- 95-3126. Receiving fee for services in arresting fugitives.
- 95-3127. Immunity from service of process in certain civil actions.
- 95-3128. Written waiver of extradition proceedings.
- 95-3129. Nonwaiver by this state.
- 95-3130. No immunity from other criminal prosecutions while in this state.
- 95-3131 to 95-3136. [Transferred from Title 94.]

**95-3101. Definitions.** Where appearing in this act, the term “governor” includes any person performing the functions of governor by authority of the law of this state. The term “executive authority” includes the governor, and any person performing the functions of governor in a state other than this state. The term “state,” referring to a state other than this state, includes any other state or territory, organized or unorganized, of the United States of America.

History: En. 95-3101 by Sec. 14, Ch. 513, L. 1973.

**95-3102. Fugitives from justice—duty of governor.** Subject to the provisions of this act, the provisions of the constitution of the United States controlling, and any and all acts of Congress enacted in pursuance thereof, it is the duty of the governor of this state to have arrested and delivered up to the executive authority of any other state of the United States any person charged in that state with treason, felony, or other crime, who has fled from justice and is found in this state.

History: En. 95-3102 by Sec. 14, Ch. 513, L. 1973.

**95-3103. Demand—form.** No demand for the extradition of a person charged with crime in another state shall be recognized by the governor unless in writing alleging that the accused was present in the demanding state at the time of the commission of the alleged crime, and that thereafter he fled from the state, except in cases arising under section 95-3106, and accompanied by a copy of an indictment found or by information supported by affidavit in the state having jurisdiction of the crime, or by a copy of an affidavit made before a magistrate there, together with a copy of any warrant which was issued thereon; or by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the executive authority of the demanding state that the person claimed has escaped from confinement or has broken the terms of his bail, probation or parole. The indictment, information, or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that state; and the copy of the indictment, information, affidavit, judgment of conviction or sentence must be authenticated by the executive authority making the demand.

History: En. 95-3103 by Sec. 14, Ch. 513, L. 1973.

**95-3104. Investigation by governor.** When a demand shall be made upon the governor of this state by the executive authority of another state for the surrender of a person so charged with crime, the governor may call upon the attorney general or any prosecuting officer in this state to investigate or assist in investigating the demand, and to report to him the situation and circumstances of the person so demanded, and whether he ought to be surrendered.

History: En. 95-3104 by Sec. 14, Ch. 513, L. 1973.

**95-3105. Extradition of persons imprisoned or awaiting trial in another state or who have left the demanding state under compulsion.** When it is desired to have returned to this state a person charged in this state with a crime, and such person is imprisoned or is held under criminal proceedings then pending against him in another state, the governor of this state may agree with the executive authority of such other state for the extradition of such person before the conclusion of such proceedings or his term of sentence in such other state, upon condition that such person

be returned to such other state at the expense of this state as soon as the prosecution in this state is terminated.

The governor of this state may also surrender on demand of the governor of any other state any person in this state who is charged in the manner provided in section 95-3123 with having violated the laws of the state whose governor is making the demand, even though such person left the demanding state involuntarily.

History: En. 95-3105 by Sec. 14, Ch. 513, L. 1973.

**95-3106. Extradition of persons not present in demanding state at time of commission of crime.** The governor of this state may also surrender, on demand of the executive authority of any other state, any person in this state charged in such other state in the manner provided in section 95-3103 with committing an act in this state, or in a third state, intentionally resulting in a crime in the state whose executive authority is making the demand, and the provisions of this act not otherwise inconsistent shall apply to such cases, even though the accused was not in that state at the time of the commission of the crime, and has not fled therefrom.

History: En. 95-3106 by Sec. 14, Ch. 513, L. 1973.

**95-3107. Issuance of warrant of arrest by governor—recitals therein.** If the governor decides that the demand should be complied with, he shall sign a warrant of arrest, which shall be sealed with the state seal, and be directed to any peace officer or other person whom he may think fit to entrust with the execution thereof. The warrant must substantially recite the facts necessary to the validity of its issuance.

History: En. 95-3107 by Sec. 14, Ch. 513, L. 1973.

**95-3108. Execution of warrant—manner and place thereof.** Such warrant shall authorize the peace officer or other person to whom directed to arrest the accused at any time and any place where he may be found within the state and to command the aid of all peace officers or other persons in the execution of the warrant, and to deliver the accused, subject to the provisions of this act to the duly authorized agent of the demanding state.

History: En. 95-3108 by Sec. 14, Ch. 513, L. 1973.

**95-3109. Authority of arresting officer.** Every such peace officer or other person empowered to make the arrest, shall have the same authority, in arresting the accused, to command assistance therein, as peace officers have by law in the execution of any criminal process directed to them, with like penalties against those who refuse their assistance.

History: En. 95-3109 by Sec. 14, Ch. 513, L. 1973.



**95-3110. Rights of accused persons—habeas corpus.** (1) No person arrested upon such warrant may be delivered over to the agent whom the executive authority demanding him has appointed to receive him unless he is first taken without delay before a judge of a court of record in this state, who shall inform him of the demand made for his surrender and of the crime with which he is charged and that he has the right to demand and procure legal counsel.

(2) If the prisoner or his counsel states that he or they desire to test the legality of his arrest, the judge of the court of record shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus. When the writ is applied for, notice thereof and of the time and place of hearing thereon shall be given to the prosecuting officer of the county in which the arrest was made and in which the accused is in custody and to the agent of the demanding state.

History: En. 95-3110 by Sec. 14, Ch. 513, L. 1973; amd. Sec. 52, Ch. 184, L. 1977.

**Amendments**

The 1977 amendment inserted the subsection designations; and made minor changes in punctuation and phraseology.

**95-3111. Penalty for noncompliance with preceding section.** Any officer who shall deliver to the agent for extradition of the demanding state a person in his custody under the governor's warrant, in willful disobedience of the last section, shall be guilty of a misdemeanor and, on conviction, shall be fined not more than one thousand dollars (\$1,000) or be imprisoned not more than six (6) months, or both.

History: En. 95-3111 by Sec. 14, Ch. 513, L. 1973.

**95-3112. Confinement of accused in jail when necessary.** The officer or persons executing the governor's warrant of arrest, or the agent of the demanding state to whom the prisoner may have been delivered may, when necessary, confine the prisoner in the jail of any county or city through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the officer or person having charge of him is ready to proceed on his route, such officer or person, however, being chargeable with the expense of keeping.

The officer or agent of a demanding state to whom a prisoner may have been delivered following extradition proceedings in another state, or to whom a prisoner may have been delivered after waiving extradition in such other state, and who is passing through this state with such a prisoner for the purpose of immediately returning such prisoner to the demanding state may, when necessary, confine the prisoner in the jail of any county or city through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the officer or agent having charge of him is ready to proceed on his route, such officer or agent, however, being chargeable with the expense of keeping; provided, however, that such officer or agent shall produce and show to the keeper of such jail satisfactory written evidence of the fact that he is actually transporting such prisoner to the demanding state after a req-

quisition by the executive authority of such demanding state. Such prisoner shall not be entitled to demand a new requisition while in this state.

History: En. 95-3112 by Sec. 14, Ch. 513, L. 1973.

**95-3113. Arrest of accused before making of requisition.** (1) A judge or magistrate of this state shall issue a warrant directed to any peace officer commanding the officer to apprehend the person named therein wherever the person may be found in this state and to bring the person before the same or any other judge, magistrate, or court who or which may be available in or convenient of access to the place where the arrest is made to answer the charge or complaint and affidavit whenever:

(a) a person within this state is charged on the oath of a credible person before the judge or magistrate with the commission of a crime in another state and, except in cases arising under 95-3106, with having fled from justice or with having been convicted of a crime in that state and having escaped from confinement or having broken the terms of his bail, probation, or parole; or

(b) a complaint is made before the judge or magistrate setting forth on the affidavit of a credible person in another state that a crime has been committed in the other state and that the accused is believed to be in this state and has been charged in the other state with:

(i) the commission of the crime and, except in cases arising under 95-3106, having fled from justice; or

(ii) having been convicted of a crime in that state and having escaped from bail, probation, or parole.

(2) A certified copy of the sworn charge or complaint and affidavit upon which the warrant is issued shall be attached to the warrant.

History: En. 95-3113 by Sec. 14, Ch. 513, L. 1973; amd. Sec. 53, Ch. 184, L. 1977.

#### Amendments

The 1977 amendment inserted the subsection designations; and made minor changes in phraseology, punctuation and style.

**95-3114. Arrest of accused without warrant therefor.** The arrest of a person may be lawfully made also by any peace officer or a private person, without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one (1) year, but when so arrested the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against him under oath setting forth the ground for the arrest as in the preceding section; and thereafter this answer shall be heard as if he had been arrested on a warrant.

History: En. 95-3114 by Sec. 14, Ch. 513, L. 1973.

**95-3115. Commitment to await requisition—bail.** If from the examination before the judge or magistrate it appears that the person held is the person charged with having committed the crime alleged, and, except, in

cases arising under section 95-3106 that he has fled from justice, the judge or magistrate must, by a warrant reciting the accusation, commit him to the county jail for such a time not exceeding thirty (30) days and specified in the warrant, as will enable the arrest of the accused to be made under a warrant of the governor on a requisition of the executive authority of the state having jurisdiction of the offense, unless the accused give bail as provided in the next section, or until he shall be legally discharged.

History: En. 95-3115 by Sec. 14, Ch. 513, L. 1973.

**95-3116. Bail—in what cases—conditions of bond.** Unless the offense with which the prisoner is charged is shown to be an offense punishable by death or life imprisonment under the laws of the state in which it was committed, a judge or magistrate in this state may admit the person arrested to bail by bond or undertaking, with sufficient sureties, and in such sum as he deems proper, conditioned for his appearance before him at a time specified in such bond or undertaking, and for his surrender, to be arrested upon the warrant of the governor of this state.

History: En. 95-3116 by Sec. 14, Ch. 513, L. 1973.

**95-3117. Extension of time of commitment adjournment.** If the accused is not arrested under the warrant of the governor by the expiration of the time specified in the warrant, bond, or undertaking, a judge or magistrate may discharge him or may recommit him for a further period of 60 days or a supreme court justice or district court judge may again take bail for his appearance and surrender, as provided in 95-3116, for a period not to exceed 60 days after the date of the new bond or undertaking.

History: En. 95-3117 by Sec. 14, Ch. 513, L. 1973; amd. Sec. 54, Ch. 184, L. 1977.

#### Amendments

The 1977 amendment substituted "district court judge" for "county judge" near the middle of the section; and made minor changes in phraseology and style.

**95-3118. Bail—when forfeited.** If the prisoner is admitted to bail, and fails to appear and surrender himself according to the conditions of his bond, the judge, or magistrate by proper order, shall declare the bond forfeited and order his immediate arrest without warrant if he be within this state. Recovery may be had on such bond in the name of the state as in the case of other bonds or undertakings given by the accused in criminal proceedings within this state.

History: En. 95-3118 by Sec. 14, Ch. 513, L. 1973.

**95-3119. Persons under criminal prosecution in this state at time of requisition.** If a criminal prosecution has been instituted against such person under the laws of this state and is still pending, the governor, in his discretion, either may surrender him on demand of the executive authority of another state or hold him until he has been tried and discharged or convicted and punished in this state.



**History:** En. 95-3119 by Sec. 14, Ch. 513, L. 1973.

**95-3120. Guilt or innocence of accused, when inquired into.** The guilt or innocence of the accused as to the crime of which he is charged may not be inquired into by the governor or in any proceeding after the demand for extradition provided for in 95-3103 has been presented to the governor, except as it may be involved in identifying the person held as the person charged with the crime.

**History:** En. 95-3120 by Sec. 14, Ch. 513, L. 1973; amd. Sec. 55, Ch. 184, L. 1977.

#### **Amendments**

The 1977 amendment substituted "provided for in 95-3103" for "accompanied by a charge of crime in legal form as above provided"; and made a minor change in phraseology.

#### **Presence in Demanding State**

This section does not prevent inquiry in habeas corpus proceedings brought by the accused as to whether the accused was in the demanding state at the time of the offense, and the accused should have been allowed to introduce evidence that he was not. *State ex rel. Hart v. District Court*, 157 M 287, 485 P 2d 698.

**95-3121. Alias warrant of arrest.** The governor may recall his warrant of arrest or may issue another warrant whenever he deems proper.

**History:** En. 95-3121 by Sec. 14, Ch. 513, L. 1973.

**95-3122. Fugitives from this state—duty of governors.** Whenever the governor of this state shall demand a person charged with crime or with escaping from confinement or breaking the terms of his bail, probation or parole in this state, from the chief executive of any other state, or from the chief justice or an associate justice of the supreme court of the District of Columbia authorized to receive such demand under the laws of the United States, he shall issue a warrant under the seal of this state, to some agent, commanding him to receive the person so charged if delivered to him and convey him to the proper officer of the county in this state in which the offense was committed.

**History:** En. 95-3122 by Sec. 14, Ch. 513, L. 1973.

**95-3123. Application for issuance of requisition.** (1) When the return to this state of a person charged with a crime in this state is required, the prosecuting attorney shall present to the governor his written application for a requisition for the return of the person charged. The application shall state the name of the person charged, the crime charged against him, the approximate time, place, and circumstances of its commission, and the state in which he is believed to be, including the location of the accused therein at the time the application is made. It shall certify that in the opinion of the prosecuting attorney the ends of justice require the arrest and return of the accused to this state for trial and that the proceeding is not being instituted to enforce a private claim.

(2) When the return to this state is required of a person who has been convicted of a crime in this state and has escaped from confinement or broken the terms of his bail, probation, or parole, the prosecuting attorney of the county in which the offense was committed, the parole

board, or the warden of the institution or sheriff of the county from which the escape was made shall present to the governor a written application for a requisition for the return of the person. The application shall state the name of the person, the crime of which he was convicted, the circumstances of his escape from confinement or of the breach of the terms of his bail, probation, or parole, and the state in which he is believed to be, including the location of the person therein at the time the application is made.

(3) The application shall be verified by affidavit, executed in duplicate, and accompanied by two certified copies of the:

- (a) indictment returned;
- (b) information and affidavit filed;
- (c) complaint made to the judge or magistrate stating the offense with which the accused is charged;
- (d) judgment of conviction; or
- (e) sentence.

(4) The prosecuting officer, parole board, warden, or sheriff may also attach such further affidavits and other documents in duplicate as he considers proper to be submitted with the application.

(5) One copy of the application, with the action of the government indicated by endorsement thereon, and one of the certified copies of the indictment, complaint, information and affidavits, judgment of conviction, or sentence shall be filed in the office of the secretary of state to remain of record in that office. The other copies of all papers shall be forwarded with the governor's requisition.

History: En. 95-3123 by Sec. 14, Ch. 513, L. 1973; amd. Sec. 56, Ch. 184, L. 1977.

#### Amendments

The 1977 amendment made minor changes in phraseology, punctuation and style.

**95-3124. Fugitives from this state—accounts.** When the governor of this state, in the exercise of the authority conferred by section 2, article IV, of the constitution of the United States, or by the laws of this state, demands from the executive authority of any state of the United States, or of any foreign government, the surrender to the authorities of this state of a fugitive from justice, who has been found and arrested in such state or foreign government, the accounts of the person employed by him to bring back such fugitive must be audited by the department of administration, and paid out of the state treasury.

History: En. 95-3124 by Sec. 14, Ch. 513, L. 1973; amd. Sec. 18, Ch. 343, L. 1977.

#### Repealing Clause

Section 19 of Ch. 343, Laws 1977 read "Sections 75-8802 and 79-305, R. C. M. 1947, are repealed."

#### Amendments

The 1977 amendment substituted "department of administration" for "board of examiners" near the end of the section.

**95-3124.1. Expenses for returning fugitives.** An agent of this state authorized to return a fugitive from justice to this state may utilize commercial transportation, aircraft, or motor vehicle to return the fugitive.

The agent shall be paid travel expenses, as provided for in 59-538, 59-539, and 59-801, as amended, incurred in returning the fugitive to this state.

**History:** En. 95-3124.1 by Sec. 1, Ch. 331, L. 1975; amd. Sec. 31, Ch. 453, L. 1977.

#### **Title of Act**

An act providing for the payment of actual and necessary expenses to agents required to return fugitives to this state.

#### **Amendments**

The 1977 amendment substituted "travel expenses, as provided for in 59-538, 59-539, and 59-801, as amended" in the second sentence for "all actual and necessary expenses"; and deleted a former third sentence which provided the method for calculating expense where a vehicle not owned by the state was used.

### **95-3125. Restrictions on compensation for assisting return of fugitive.**

No compensation, fee, or reward of any kind may be paid to or received by a public officer of this state or other person for a service rendered in procuring from the governor the demand mentioned in 95-3124, for the surrender of the fugitive, or for conveying him to this state or detaining him therein, except as provided in 95-3124 and 95-3124.1.

**History:** En. 95-3125 by Sec. 14, Ch. 513, L. 1973; amd. Sec. 57, Ch. 184, L. 1977.

#### **Amendments**

The 1977 amendment substituted "95-

3124 and 95-3124.1" for "such section" at the end of the section; and made minor changes in phraseology, punctuation and style.

**95-3126. Receiving fee for services in arresting fugitives.** Every person who violates any of the provisions of section 95-3125 is guilty of a misdemeanor.

**History:** En. 95-3126 by Sec. 14, Ch. 513, L. 1973.

**95-3127. Immunity from service of process in certain civil actions.** A person brought into this state on, or after waiver of, extradition based on a criminal charge shall not be subject to service of personal process in civil actions arising out of the same facts as the criminal proceeding to answer which he is being or has been returned, until he has been convicted in the criminal proceedings, or, if acquitted, until he has had reasonable opportunity to return to the state from which he was extradited.

**History:** En. 95-3127 by Sec. 14, Ch. 513, L. 1973.

**95-3128. Written waiver of extradition proceedings.** Any person of this state charged with having committed any crime in another state or alleged to have escaped from confinement, or broken the terms of his bail, probation, or parole may waive the issuance and service of the warrant provided for in sections 95-3107 and 95-3108 and all other procedure incidental to extradition proceedings, by executing or subscribing in the presence of a judge of any court of record within this state a writing which states that he consents to return to the demanding state; provided, however, that before such waiver shall be executed or subscribed by such person it shall be the duty of such judge to inform such person of his rights to the issuance and service of a warrant of extradition and to obtain a writ of habeas corpus as provided for in section 95-3110.



If and when such consent has been duly executed it shall forthwith be forwarded to the office of the governor of this state and filed therein. The judge shall direct the officer having such person in custody to deliver forthwith such person to the duly accredited agent or agents of the demanding state, and shall deliver or cause to be delivered to such agent or agents a copy of such consent; provided, however, that nothing in this section shall be deemed to limit the rights of the accused person to return voluntarily and without formality, to the demanding state, nor shall this waiver procedure be deemed to be an exclusive procedure or to limit the powers, rights, or duties of the officers of the demanding state or of this state.

History: En. 95-3128 by Sec. 14, Ch. 513, L. 1973.

**95-3129. Nonwaiver by this state.** Nothing contained in this act may be considered a waiver by this state of its right, power, or privilege to try the demanded person for a crime committed within this state or of its right, power, or privilege to regain custody of the person by extradition proceedings or otherwise for the purpose of trial, sentence, or punishment for a crime committed within this state; nor may any proceedings had under this act which result in or fail to result in extradition be considered in any way a waiver by this state of any of its rights, privileges, or jurisdiction.

History: En. 95-3129 by Sec. 14, Ch. 513, L. 1973; amd. Sec. 58, Ch. 184, L. 1977.

#### Amendments

The 1977 amendment made minor changes in phraseology and punctuation.

**95-3130. No immunity from other criminal prosecutions while in this state.** After a person has been brought back to this state by extradition proceedings, he may be tried in this state for other crimes which he may be charged with having committed here as well as that specified in the requisition for his extradition.

History: En. 95-3130 by Sec. 14, Ch. 513, L. 1973.

### 95-3131 to 95-3136. [Transferred from Title 94.]

Compiler's Notes	New Sec.	Vol. 8
These sections were originally numbered 94-1101-1 to 94-1101-6. Section 29, Ch. 513, Laws of 1973, renumbered them to appear in this title. Because there has been no change in text, the sections are not reprinted here but may be found in bound Volume Eight as follows:	95-3131	94-1101-1
	95-3132	94-1101-2
	95-3133	94-1101-3
	95-3134	94-1101-4
	95-3135	94-1101-5
	95-3136	94-1101-6

## CHAPTER 32—PROBATION, PAROLE AND CLEMENCY

### Section

- 95-3201, 95-3202. [Transferred from Title 94.]
- 95-3202.1. Retaking or re-incarceration of parolee or probationer under interstate supervision.
- 95-3202.2. Hearing officers for interstate cases.
- 95-3202.3. Notice of allegations—counsel—confrontation of witnesses—record.
- 95-3202.4. Record of hearing in another state to have effect in Montana.
- 95-3203. Act, how cited.

- 95-3204. Board of pardons.
- 95-3205. Definitions.
- 95-3206. Orders, records, report—reviewability, confidentiality.
- 95-3209. [Transferred from Title 94.]
- 95-3210. [Transferred.]
- 95-3213. [Transferred.]
- 95-3214. Parole authority and procedure.
- 95-3215. Duration of parole.
- 95-3216 to 95-3218. [Transferred from Title 94.]
- 95-3220. [Transferred.]
- 95-3221, 95-3222. [Transferred from Title 94.]
- 95-3223. Cases of executive clemency.
- 95-3224. Notice of hearing on applications for executive clemency.
- 95-3225 to 95-3227. [Transferred from Title 94.]
- 95-3228. When publication not necessary.
- 95-3229 to 95-3232. [Transferred from Title 94.]

### 95-3201. Governor may make interstate compact for control of crime, etc.

#### Compiler's Notes

This section was originally numbered 94-7901. Section 29, Ch. 513, Laws of 1973 renumbered it to appear here. Because there has been no change in text, the section is not reprinted here but may be found in bound Volume Eight as sec. 94-7901.

NOTE.—Uniform State Law. The following states have enacted the Uniform Act of Out of State Parolee Supervision: Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Idaho, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New

Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wisconsin.

#### Constitutionality

Requirement that parolee sign waiver of extradition before release to another state was not unconstitutional, and parolee could be detained for parole violation by unauthorized departure from the host state. In re Petition of Schwartz, 154 M 505, 463 P 2d 316, certiorari denied 398 US 913, 90 S Ct. 1413.

### 95-3202. [Transferred from Title 94.]

#### Compiler's Notes

This section was originally numbered 94-7902. Section 2, Ch. 513, Laws of 1973, renumbered it to appear in this title. Be-

cause there has been no change in text, the section is not reprinted here but may be found in bound Volume Eight as sec. 94-7902.

**95-3202.1. Retaking or re-incarceration of parolee or probationer under interstate supervision.** Where supervision of a parolee or probationer is being administered pursuant to the interstate compact for the supervision of parolees and probationers, the appropriate judicial or administrative authorities in this state shall notify the compact administrator of the sending state whenever, in their view, consideration should be given to retaking or re-incarceration for a parole or probation violation. Prior to the giving of any such notification, a hearing shall be held in accordance with this act within a reasonable time, unless such hearing is waived by the parolee or probationer. The appropriate officer or officers of this state shall as soon as practicable, following termination of any such hearing, report to the sending state, furnish a copy of the hearing record, and make recommendations regarding the disposition to be made of the parolee or probationer by the sending state. Pending any proceeding pursuant to this section, the appropriate officers of this state may take custody of and detain the parolee or probationer involved for a period not to exceed fifteen (15) days prior to the hearing and, for such reasonable period after

the hearing or waiver as may be necessary to arrange for the retaking or re-incarceration if it appears to the hearing officer or officers that re-taking or re-incarceration is likely to follow.

History: En. Sec. 1, Ch. 75, L. 1973.

**Title of Act**

An act providing for interstate parole and probation hearing procedures, re-

quiring notice, assistance of counsel, confrontation of witnesses under certain conditions, a hearing record, and authorizing out-of-state hearings.

**95-3202.2. Hearing officers for interstate cases.** Any hearing pursuant to this act may be held before the administrator of the interstate compact for the supervision of parolees and probationers, a deputy of such administrator, or any other person authorized pursuant to the laws of this state to hear cases of alleged parole or probation violation, except that no hearing officer shall be the person making the allegation of violation.

History: En. Sec. 2, Ch. 75, L. 1973.

**95-3202.3. Notice of allegations—counsel—confrontation of witnesses—record.** With respect to any hearing pursuant to this act, the parolee or probationer:

(1) Shall have reasonable notice in writing of the nature and content of the allegations to be made, including notice that its purpose is to determine whether there is probable cause to believe that he has committed a violation that may lead to a revocation of parole or probation.

(2) Shall be permitted to consult with any persons whose assistance he reasonably desires, prior to the hearing.

(3) Shall have the right to confront and examine any persons who have made allegations against him, unless the hearing officer determines that such confrontation would present a substantial present or subsequent danger of harm to such person or persons.

(4) May admit, deny or explain the violation alleged and may present proof, including affidavits and other evidence, in support of his contentions. A record of the proceedings shall be made and preserved.

History: En. Sec. 3, Ch. 75, L. 1973.

**95-3202.4. Record of hearing in another state to have effect in Montana.** In any case of alleged parole or probation violation by a person being supervised in another state pursuant to the interstate compact for the supervision of parolees and probationers, any appropriate judicial or administrative officer or agency in another state is authorized to hold a hearing on the alleged violation. Upon receipt of the record of a parole or probation violation hearing held in another state pursuant to a statute substantially similar to this act, such record shall have the same standing and effect as though the proceeding of which it is a record was had before the appropriate officer or officers in this state, and any recommendations contained in or accompanying the record shall be fully considered by the appropriate officer or officers of this state in making disposition of the matter.

History: En. Sec. 4, Ch. 75, L. 1973.



**95-3203. Act, how cited.** This act shall be known and may be cited as the "Parole and Executive Clemency Act."

**History:** En. Sec. 1, Ch. 153, L. 1955; Sec. 94-9821, R. C. M. 1947; redes. 95-3203 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 2, Ch. 333, L. 1975.

#### Amendments

The 1975 amendment substituted the present title for "Probation, Parole, and Executive Clemency Act."

**95-3204. Board of pardons.** (1) The board of pardons is responsible for executive clemency and parole as provided in this chapter.

(2) The board shall meet at least twice each month at the state prison.

(3) The principal office of the board shall be in Deer Lodge.

**History:** En. Sec. 2, Ch. 153, L. 1955; Sec. 94-9822, R. C. M. 1947; redes. 95-3204 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 81, Ch. 120, L. 1974; amd. Sec. 3, Ch. 333, L. 1975.

#### Amendments

The 1974 amendment rewrote this section (for former law, see section 94-9822 in bound Volume Eight).

The 1975 amendment substituted "is responsible for executive clemency and parole as provided in this chapter" for "shall administer the executive clemency, probation and parole system, and shall endeavor to secure the effective application and improvement of that system and the laws upon which it is based" in subsection (1); and substituted "twice each month" for "once each month" in subsection (2).

**95-3205. Definitions.** Unless the context requires otherwise, in this chapter:

(1) "Board" means the board of pardons provided for in section 82A-804.

(2) "Department" means the department of institutions provided for in Title 82A, chapter 8.

(3) "Parole" means the release to the community of a prisoner by the decision of the board prior to the expiration of his term, subject to conditions imposed by the board and subject to supervision of the department of institutions.

(4) "Executive clemency" refers to the powers of the governor as provided by section 12 of article VI of the constitution of Montana.

**History:** En. Sec. 3, Ch. 153, L. 1955; Sec. 94-9823, R. C. M. 1947; amd. Sec. 1, Ch. 73, L. 1973; redes. 95-3205 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 82, Ch. 120, L. 1974; amd. Sec. 5, Ch. 333, L. 1975.

#### Amendments

The 1973 amendment changed the constitutional reference in subdivision (4) from section 9 of article VII of the 1889 constitution to section 12 of article VI of the new constitution.

The 1974 amendment inserted subdivision (1); and made minor changes in phraseology, punctuation and style.

The 1975 amendment substituted "chapter" for "act" in the introductory phrase; inserted subdivision (2); deleted a former subdivision (2) which read: "Probation means the release by the court without imprisonment except as otherwise provided by law, of a defendant found guilty of a crime upon verdict or plea, subject to conditions imposed by the court and subject to supervision of the board upon direction of the court"; and substituted "subject to supervision of the department of institutions" for "subject to its supervision" at the end of subdivision (3).

**95-3206. Orders, records, report—reviewability, confidentiality.** (1) Decisions of the board shall be by majority vote. The orders of the board are not reviewable except as to compliance with the terms of this act.

(2) The department shall keep a record of the board's acts and decisions available to the public. However, all social records, including the presentence report, the preparole report, and the supervision history obtained in the discharge of official duty by the department, shall be confidential and shall not be disclosed directly or indirectly to anyone other than the members of the board or a judge. The board or a court may in its discretion, when the best interests or welfare of a particular defendant or prisoner makes such action desirable or helpful, permit the inspection of the report or any parts thereof by the prisoner or his attorney.

**History:** En. Sec. 4, Ch. 153, L. 1955; amd. Sec. 42, Ch. 93, L. 1969; Sec. 94-9824, R. C. M. 1947; redes. 95-3206 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 83, Ch. 120, L. 1974; amd. Sec. 6, Ch. 333, L. 1975; amd. Sec. 59, Ch. 184, L. 1977.

#### Amendments

The 1974 amendment deleted a former first sentence relating to adoption of an official seal; deleted a second sentence relating to a majority of the board constituting a quorum; substituted "shall be" for "may be" before "by majority vote" in the present first sentence; substituted

"department" for "board" at the beginning of the third sentence; deleted a final sentence relating to the board reporting as provided in section 82-4002; and made minor changes in phraseology and punctuation.

The 1975 amendment substituted "the department" for "any member or employee of the board" near the middle of the section.

The 1977 amendment inserted the subsection designations; and made minor changes in phraseology, punctuation and style.

### 95-3207. Repealed.

#### Repeal

Section 95-3207 (Sec. 5, Ch. 153, L. 1955; Sec. 1, Ch. 122, L. 1957; Sec. 11, Ch. 97, L. 1961; Sec. 10, Ch. 225, L. 1963; Sec. 16, Ch. 237, L. 1967; Sec. 94-9825, R. C. M. 1947; Sec. 29, Ch. 513, L. 1973; Sec. 84,

Ch. 120, L. 1974), relating to the appointment, terms, and compensation of the administrator and employees for administration of the Probation, Parole, and Executive Clemency Act, was repealed by Sec. 17, Ch. 333, Laws 1975.

### 95-3208. Repealed.

#### Repeal

Section 95-3208 (Sec. 6, Ch. 153, L. 1955; Sec. 12, Ch. 97, L. 1961; Sec. 94-9826, R. C. M. 1947; redes. 95-3208 by Sec. 29,

Ch. 513, L. 1973), relating to payment of expenses of the board of pardons, was repealed by Sec. 96, Ch. 120, Laws of 1974.

### 95-3209. [Transferred from Title 94.]

#### Compiler's Notes

This section was originally numbered 94-9827. Section 29, Ch. 513, Laws of 1973 renumbered it to appear in this

title. Because there has been no change in text, the section is not reprinted here but may be found in bound Volume Eight as sec. 94-9827.

### 95-3210. [Transferred.]

#### Compiler's Notes

Section 9, Ch. 333, Laws of 1975 renumbered this section as sec. 95-3303.

### 95-3211, 95-3212. Repealed.

#### Repeal

Sections 95-3211, 95-3212 (Secs. 9, 10, Ch. 153, L. 1955), relating to the duties of probation and parole officers and the

conditions of probation and suspended sentences, were repealed by Sec. 17, Ch. 333, Laws 1975.

**95-3213. [Transferred.]****Compiler's Notes**

This section was originally numbered 94-9831. Section 29, Ch. 513, Laws of 1973

renumbered it to appear as sec. 95-3213. Sec. 15, Ch. 333, Laws of 1975 renumbered it as sec. 95-3305.

**95-3214. Parole authority and procedure.** (1) Subject to the following restrictions, the board shall release on parole by appropriate order any person confined in the Montana state prison, except persons under sentence of death and persons serving sentences imposed under 95-2206(3)(b), when in its opinion there is reasonable probability that the prisoner can be released without detriment to himself or to the community:

(a) No convict serving a time sentence may be paroled until he has served at least one-half of his full term, less the good time allowance provided for in 80-1905; except that a convict designated as a nondangerous offender under 95-2206.16 may be paroled after he has served one-quarter of his full term, less the good time allowance provided for in 80-1905. Any offender serving a time sentence may be paroled after he has served, upon his term of sentence, 17½ years.

(b) No convict serving a life sentence may be paroled until he has served 30 years, less the good time allowance provided for in 80-1905.

(2) A parole shall be ordered only for the best interests of society and not as an award of clemency or a reduction of sentence or pardon. A prisoner shall be placed on parole only when the board believes that he is able and willing to fulfill the obligations of a law-abiding citizen.

(3) (a) Within 2 months after his admission and at such intervals thereafter as it determines, the board shall consider all pertinent information regarding each prisoner, including the circumstances of his offense, his previous social history and criminal record, his conduct, employment, and attitude in prison, and the reports of any physical and mental examinations which have been made.

(b) Before ordering the parole of any prisoner the board shall interview him.

(4) (a) Every prisoner while on parole shall remain in the legal custody of the institution from which he was released but shall be subject to the orders of the board.

(b) When an order for parole is issued, it shall recite the conditions thereof.

(5) The board may adopt any other rules it considers proper or necessary with respect to the eligibility of prisoners for parole, the conduct of parole hearings, and conditions to be imposed upon parolees.

**History:** En. Sec. 12, Ch. 153, L. 1955; Sec. 94-9832, R. C. M. 1947; redes. 95-3214 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 86, Ch. 120, L. 1974; amd. Sec. 3, Ch. 312, L. 1975; amd. Sec. 60, Ch. 184, L. 1977; amd. Sec. 3, Ch. 340, L. 1977; amd. Sec. 3, Ch. 580, L. 1977.

appropriate order" in the first sentence after "shall release on parole"; substituted the amendments do not appear to conflict, the code commissioner has made a composite section embodying the changes made by all amendments.

**Amendments****Compiler's Notes**

This section was amended three times in 1977 by Chs. 184, 340, and 580. Since

The 1974 amendment inserted "by ap-  
"as provided in section 80-1905" in subdi-  
visions (1)(a) and (1)(b) for "as pro-



vided in section 80-740"; deleted a second sentence in subdivision (1)(b) which read "All paroles shall issue upon order of the board, duly adopted"; and made minor changes in phraseology, punctuation and style.

The 1975 amendment inserted the exception at the end of the first sentence of subdivision (1)(a) that no convict designated a persistent felony offender may be paroled until he has served at least one-third of his full term, less good time allowances; inserted "A first offender" at the beginning of the second sentence of subdivision (1)(a); added the third sentence of subdivision (1)(a); and increased the required service of a life sentence in subdivision (1)(b) from 25 to 30 years.

Chapter 184, Laws of 1977, made minor changes in phraseology, punctuation and style.

Chapter 340, Laws of 1977, rewrote subdivision (1)(a) which read: "That no convict serving a time sentence shall be paroled until he has served at least one-quarter ( $\frac{1}{4}$ ) of his full term, less good time allowances off, as provided in section 80-1905; except that no convict designated a persistent felony offender under section

95-2206.5 may be paroled until he has served at least one-third ( $\frac{1}{3}$ ) of his full term, less good time allowances off, as provided in section 80-1905. A first offender serving a time sentence may be paroled after he has served, upon his term of sentence, twelve and one-half ( $12\frac{1}{2}$ ) years. A persistent felony offender as defined in section 95-2206.5 may be paroled after he has served, upon his term of sentence, seventeen and one-half ( $17\frac{1}{2}$ ) years."

Chapter 580, Laws of 1977, inserted "and persons serving sentences imposed under 95-2206(3)(b)" near the beginning of subdivision (1); and made minor changes in phraseology, punctuation and style.

#### Parole to Out-of-State Prison

Prisoner who had been sentenced currently in Wyoming and in Montana could not be released on parole from the Montana prison since the Wyoming sentence provided that if the duration of the Wyoming sentence had not expired at the time of defendant's release from the Montana prison then the prisoner should be returned to Wyoming. *Petition of Glover*, — M —, 539 P 2d 721.

### DECISIONS UNDER FORMER LAW

#### Conditions for Parole

Where parolee was ordered not to be found in the company of persons under the age of eighteen and to refrain from being in and around the vicinity of certain grade schools, junior high schools, and high schools under section 95-2206, and

he was further restricted to Silver Bow county, excluding the city of Butte, the latter condition did not violate former section 95-3212 (section 94-9830 in parent volume). In re *Petition of Dunn*, 158 M 73, 488 P 2d 902.

**95-3215. Duration of parole.** A prisoner on parole who has served one-half of his term or terms, less the good time allowance, or a non-dangerous offender on parole who has served one-quarter of his term or terms, less the good time allowance, is considered released on parole until the expiration of the maximum term or terms for which he was sentenced, less the good time allowance provided for in 80-1905.

**History:** En. Sec. 13, Ch. 153, L. 1955; Sec. 94-9833, R. C. M. 1947; redes. 95-3215 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 87, Ch. 120, L. 1974; amd. Sec. 4, Ch. 312, L. 1975; amd. Sec. 61, Ch. 184, L. 1977; amd. Sec. 4, Ch. 340, L. 1977.

#### Compiler's Notes

This section was amended twice in 1977, once by Ch. 184 and once by Ch. 340. Since the amendments do not appear to conflict, the code commissioner has made a composite section embodying the changes made by both amendments.

#### Amendments

The 1974 amendment substituted "as provided in section 80-1905" for "as pro-

vided in section 80-740"; and made minor changes in phraseology and punctuation.

The 1975 amendment inserted "or a persistent felony offender who has served one-third ( $\frac{1}{3}$ ) of his term or terms, less good time allowances."

Chapter 184, Laws of 1977, made minor changes in phraseology and style.

Chapter 340, Laws of 1977, substituted "one-half of his term or terms, less good time allowances, or a nondangerous offender on parole who has served one-quarter of his term or terms, less good time allowances" for "one-fourth ( $\frac{1}{4}$ ) of his term or terms, less good time allowances, or a persistent felony offender who has served one-third ( $\frac{1}{3}$ ) of his term or terms, less good time allowances."

**Application of Act**

Section 5 of Ch. 340, Laws 1977 read "This act applies to any offender sentenced after July 1, 1977. (Section 2 of this act) applies to any prisoner who, after July 1, 1977, commits an offense while he is imprisoned in the state prison or while he is

released on parole or under the prisoner furlough program."

**Repealing Clause**

Section 6 of Ch. 340, Laws 1977 read "Section 95-2206.5, R. C. M. 1947, is repealed."

**95-3216. [Transferred from Title 94.]****Compiler's Notes**

This section was originally numbered 94-9834. Section 29, Ch. 513, Laws of 1973, renumbered it to appear here. Be-

cause there has been no change in text, the section is not reprinted here but may be found in bound Volume Eight as sec. 94-9834.

**95-3217. Persons may be heard—counsel.****Compiler's Notes**

This section was originally numbered 94-9835. Section 29, Ch. 513, Laws of 1973 renumbered it to appear here. Because there has been no change in text, the section is not reprinted here but may be found in bound Volume Eight as sec. 94-9835.

which by no means requires board to provide counsel for parolee. Petition of High Pine, 153 M 464, 457 P 2d 912.

**Right to Counsel and Hearing**

Parolee not released on prison furlough as provided under section 95-2217 was not entitled as of right to counsel and hearing before district court regarding parole violation, since neither is required under this section. Petition of Osier, 156 M 165, 477 P 2d 344.

**Appointment of Counsel Not Required**

There is no constitutional right to counsel at parole revocation hearing, but rather a statutory right under this section,

**95-3218. [Transferred from Title 94.]****Compiler's Notes**

This section was originally numbered 94-9836. Section 29, Ch. 513, Laws of 1973, renumbered it to appear in this title. Be-

cause there has been no change in text, the section is not reprinted here, but may be found in bound Volume Eight as sec. 94-9836.

**95-3219. Repealed.****Repeal**

Section 95-3219 (Sec. 17, Ch. 153, L. 1955), authorizing the board of pardons to make rules for the conduct of parolees,

and for their investigation and supervision, was repealed by Sec. 17, Ch. 333, Laws 1975.

**95-3220. [Transferred.]****Compiler's Notes**

Section 13, Ch. 333, Laws of 1975, renumbered this section as sec. 95-3308.

**95-3221, 95-3222. [Transferred from Title 94.]****Compiler's Notes**

These sections were originally numbered 94-9839 and 94-9840. Section 29, Ch. 513, Laws of 1973, renumbered them to appear in this title. Because there has been no change in text, the sections are not

reprinted here but may be found in bound Volume Eight as follows:

New Sec.	Vol. 8
95-3221	94-9839
95-3222	94-9840

**95-3223. Cases of executive clemency.** The board shall investigate and report to the governor with respect to all cases of executive clemency.

A majority of the board shall advise, investigate, and approve each such case before the action of the governor shall be final. All applications for executive clemency shall be made to the board, which shall cause an investigation to be made of all the circumstances surrounding the crime for which the applicant was convicted, and as to the individual circumstances relating to social conditions of the applicant. If the board, or a majority thereof, approves such application for executive clemency, it shall advise the governor and recommend action to be taken.

History: En. Sec. 21, Ch. 153, L. 1955; Sec. 94-9841, R. C. M. 1947; amd. Sec. 2, Ch. 73, L. 1973; redes. 95-3223 by Sec. 29, Ch. 513, L. 1973.

#### Amendments

The 1973 amendment substituted "executive clemency" at the end of the first sentence for "pardons, remissions of fines and forfeitures, and commutations of punishment after conviction and judgment for any offenses committed against the criminal laws of this state."

#### Compiler's Notes

The previous text of this section may be found under sec. 94-9841 in bound Volume Eight.

**95-3224. Notice of hearing on applications for executive clemency.** After the board has duly considered an application for executive clemency, and has by majority vote favored a recommendation of executive clemency to the governor, it must pass an order in substance as follows:

"Whereas, the Board of Pardons has officially received an application for Executive Clemency concerning \_\_\_\_\_, a convict confined in the State Prison (or to one \_\_\_\_\_, who has been found guilty of an offense committed against the laws of the state), who was convicted of the crime of \_\_\_\_\_ committed at \_\_\_\_\_, in the County of \_\_\_\_\_, State of Montana, on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, and sentenced for a term of \_\_\_\_\_ years.

"Therefore, be it ordered that \_\_\_\_\_ the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, be set apart for the consideration of said Executive Clemency matter; and all persons having an interest therein desiring to be heard either for or against the granting of the pardon or reprieve, commutation, restoration of citizenship, remission or suspension of fine or forfeiture are hereby notified to be present at \_\_\_\_\_ o'clock of said day, at \_\_\_\_\_.

"Further, ordered that a copy of this order be printed and published in the \_\_\_\_\_ (here insert name of some newspaper of general circulation in the county where the crime was committed) a daily (or weekly) newspaper printed and published at \_\_\_\_\_ in the county of \_\_\_\_\_, once each week for two weeks beginning, \_\_\_\_\_, 19\_\_\_\_, and ending \_\_\_\_\_."

History: En. Sec. 22, Ch. 153, L. 1955; Sec. 94-9842, R. C. M. 1947; amd. Sec. 3, Ch. 73, L. 1973; redes. 95-3224 by Sec. 29, Ch. 513, L. 1973.

#### Amendments

The 1973 amendment substituted "or reprieve, commutation, restoration of citizenship, remission or suspension of fine or forfeiture" for "(or commutation, remission of the fine or forfeiture)" in the second paragraph of the order.

#### Compiler's Notes

The previous text of this section may be found under sec. 94-9842 in bound Volume Eight.



**95-3225 to 95-3227. [Transferred from Title 94.]****Compiler's Notes**

These sections were originally numbered 94-9843 to 94-9845. Section 29, Ch. 513, Laws of 1973, renumbered them to appear in this title. Because there has been no change in text, the sections are not

reprinted here but may be found in bound Volume Eight as follows:

New Sec.	Vol. 8
95-3225	94-9843
95-3226	94-9844
95-3227	94-9845

**95-3228. When publication not necessary.** No publication need be made as provided in sections 95-3224, 95-3225, and 95-3226, in the following cases:

1. When there is imminent danger of the death of the person convicted or imprisoned.
2. When the term of imprisonment of the applicant is within ten (10) days of its expiration.

**History:** En. Sec. 26, Ch. 153, L. 1955; Sec. 94-9846, R. C. M. 1947; amd. and redes. 95-3228 by Sec. 28, Ch. 513, L. 1973.

**Compiler's Notes**

The previous text of this section may be found under sec. 94-9846 in bound Volume Eight.

**Amendments**

The 1973 amendment renumbered this section; and substituted the reference to sections 95-3224, 95-3225, and 95-3226, for a reference to sections 94-9842, 94-9843 and 94-9844.

**95-3229 to 95-3232. [Transferred from Title 94.]****Compiler's Notes**

These sections were originally numbered 94-9847 to 94-9850. Section 29, Ch. 513, Laws of 1973 renumbered them to appear in this title. Because there has been no change in text, the sections are not reprinted here but may be found in bound Volume Eight as follows:

New Sec.	Vol. 8
95-3229	94-9847
95-3230	94-9848
95-3231	94-9849
95-3232	94-9850

**95-3233. Repealed.****Repeal**

Section 95-3233 (Sec. 33, Ch. 153, L. 1955; Sec. 94-9833, R. C. M. 1947; redes. 95-3233 by Sec. 29, Ch. 513, L. 1973), re-

lating to the effective date and application of Chapter 153, Laws of 1955, was repealed by Sec. 96, Ch. 120, Laws of 1974 and Sec. 64, Ch. 184, Laws 1977.

**CHAPTER 33—PROBATION AND PAROLE (Continued)**

Section	
95-3301.	Definitions.
95-3302.	Powers of the department.
95-3302.1.	Qualifications of probation and parole officers.
95-3303.	Duties of the department.
95-3304.	Supervision on probation.
95-3306.	Supervision on parole.
95-3307.	Parole services.
95-3308.	Return of parole violator.
95-3309.	Cases of juveniles excluded.

**95-3301. Definitions.** As used in this chapter, unless the context requires otherwise: (1) "Board" means the board of pardons provided for in section 82A-804.

(2) "Department" means the department of institutions provided for in Title 82A, chapter 8.

(3) "Probation" means the release by the court without imprisonment except as otherwise provided by law, of a defendant found guilty of a crime upon verdict or plea, subject to conditions imposed by the court and subject to the supervision of the department upon direction of the court.

(4) "Parole" means the release to the community of a prisoner by the decision of the board prior to the expiration of his term, subject to conditions imposed by the board and subject to supervision of the department.

**History:** En. 95-3301 by Sec. 7, Ch. 333, L. 1975. "The provisions of sections 82A-116 through 82A-122 are applicable to this act."

**Compiler's Notes**

Section 16 of Ch. 333, Laws 1975 read

**95-3302. Powers of the department.** The department may: (1) appoint probation and parole officers and other employees necessary to administer this chapter;

(2) adopt rules for the conduct of persons placed on parole or probation, except that the department may not make any rule conflicting with conditions of parole imposed by the board or conditions of probation imposed by a court.

**History:** En. 95-3302 by Sec. 8, Ch. 333, L. 1975.

**95-3302.1. Qualifications of probation and parole officers.** Probation and parole officers shall have at least a college degree and shall have received at least some formal training in behavioral sciences. Exceptions to this rule must be approved by the department. Related work experience in the areas listed in section 82A-804 (2) may be substituted for educational requirements at the rate of one (1) year of experience for nine (9) months formal education, if approved by the department. All present employees will be exempt from this requirement but are encouraged to further their education at the earliest opportunity.

**History:** En. 95-3302.1 by Sec. 4, Ch. 333, L. 1975.

**Title of Act**

An act to provide qualifications for the board of pardons and place the responsibility for field services staff for probation

and parole in the department of institutions; amending sections 82A-804, 95-3203 through 95-3206, R. C. M. 1947; renumbering and amending sections 95-3210, 95-3213 and 95-3220, R. C. M. 1947; and repealing sections 95-3207, 95-3211, 95-3212, and 95-3219, R. C. M. 1947.

**95-3303. Duties of the department.** The department is responsible for any investigation and supervision requested by the board or the courts. The department shall:

(1) Divide the state into districts, and assign probation and parole officers to serve in these districts and courts;

(2) Obtain any necessary office quarters for the staff in each district;

- (3) Assign the secretarial, bookkeeping, and accounting work to the clerical employees, including receipt and disbursement of money;
- (4) Direct the work of the probation and parole officers and other employees;
- (5) Formulate methods of investigation, supervision, recordkeeping, and reports;
- (6) Conduct training courses for the staff;
- (7) Co-operate with all agencies, public and private, which are concerned with the treatment or welfare of persons on probation or parole;
- (8) Administer the interstate compact for the supervision of parolees and probationers.

**History:** En. Sec. 8, Ch. 153, L. 1955; Sec. 94-9828, R. C. M. 1947; redes. 95-3210 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 85, Ch. 120, L. 1974; amd. and redes. 95-3303 by Sec. 9, Ch. 333, L. 1975.

#### Amendments

The 1974 amendment rewrote this section. For former law, see sec. 94-9828 in bound Volume Eight.

The 1975 amendment renumbered this section; deleted the first sentence which

read: "The administrator is the executive officer of the board"; substituted "the department" for references to the administrator; deleted "subject to the direction and supervision of the department under section 82A-108" before "shall" in the introductory paragraph; deleted "subject to the approval of the board" at the beginning of subdivision (1); deleted "assigned to him" at the end of subdivision (4); and made minor changes in phraseology.

**95-3304. Supervision on probation.** (1) The department shall supervise persons during their probation period in accord with the conditions set by a court.

(2) A copy of the conditions of probation shall be signed by the probationer and given to him and his probation and parole officer who shall report on his progress under rules of the court.

(3) The probation and parole officer shall regularly advise and consult with the probationer to encourage him to improve his condition and conduct, and inform him of restoration of his rights on successful completion of his sentence.

(4) The probation and parole officer may recommend and a court may modify any condition of probation or suspension of sentence at any time. Notice shall be given to the probation and parole officer before any condition is modified and he shall be given an opportunity to present his ideas or recommendations on any modification. A copy of a modification of conditions shall be delivered to the probation and parole officer and the probationer.

(5) The probation and parole officer shall keep records as the department or the court may require.

**History:** En. 95-3304 by Sec. 10, Ch. 333, L. 1975.

#### 95-3305. Arrest—subsequent disposition.

##### Compiler's Notes

This section, originally numbered 94-9831 was redesignated as sec. 95-3213 by Sec. 29, Ch. 513, Laws of 1973; and again redesignated to appear here by Sec.

15, Ch. 333, Laws of 1975. Since there has been no change in text, the section is not reprinted here, but may be found in bound Volume Eight as sec. 94-9831.



**Fundamental Fairness**

There is no requirement of a preliminary hearing prior to revocation of parole or suspended sentence; all that is required is fundamental fairness. Petition of Meidinger, — M —, 539 P 2d 1185.

**Parole Violation**

This section does not require parolee to be taken before court for complete hearing on parole violation but provides only for persons on probation or on suspended

sentence. Petition of Spurlock, 153 M 475, 458 P 2d 80.

**Revocation of Suspended Sentence**

Defendant, who was not arrested for violation of probation until after the final order of revocation had been made by the judge and was represented by counsel at every step, had had a fair hearing and was not deprived of due process. Petition of Meidinger, — M —, 539 P 2d 1185.

**95-3306. Supervision on parole.** (1) The department shall retain custody of all persons placed on parole and shall supervise the persons during their parole period in accord with the conditions set by the board.

(2) The department shall assign personnel to assist persons eligible for parole in preparing a parole plan. Department personnel shall make a report of their efforts and findings to the board prior to its consideration of the case of the eligible person.

(3) A copy of the conditions of his parole shall be signed by the parolee and given to him and to his probation and parole officer, who shall report on his progress under the rules of the board.

(4) The probation and parole officer shall regularly advise and consult with the parolee, assist him in adjusting to community life, and inform him of the restoration of his rights on successful completion of sentence.

(5) The probation and parole officer shall keep such records as the board or department may require. All records shall be entered in the master file of the individual.

**History:** En. 95-3306 by Sec. 11, Ch. 333, L. 1975; amd. Sec. 62, Ch. 184, L. 1977.

**Amendments**

The 1977 amendment made minor changes in phraseology and punctuation.

**95-3307. Parole services.** To assist parolees the department may, in addition to other services, provide the following:

(1) employment counseling, job placement, and assistance in residential placement;

(2) family and individual counseling and treatment placement;

(3) financial counseling;

(4) vocational and educational counseling and placement; and

(5) referral services to any other state or local agencies.

The department may purchase necessary services for a parolee if they are otherwise unavailable and the parolee is unable to pay for them. It may assess all or part of the costs of such services to a parolee in accordance with his ability to pay for them.

**History:** En. 95-3307 by Sec. 12, Ch. 333, L. 1975.

**95-3308. Return of parole violator.** (1) (a) At any time during release on parole or conditional release, the department may issue a warrant

for the arrest of the released prisoner for violation of any of the conditions of release or a notice to appear to answer to a charge of violation. The notice shall be served personally upon the prisoner. The warrant shall authorize all officers named therein to return the prisoner to the actual custody of the penal institution from which he was released or to any other suitable detention facility designated by the department.

(b) Any probation and parole officer may arrest the prisoner without a warrant or may deputize any other officer with power to arrest to do so by giving him a written statement setting forth that the prisoner has, in the judgment of the probation and parole officer, violated the conditions of his release. The written statement delivered with the prisoner by the arresting officer to the official in charge of the institution from which the prisoner was released or other place of detention shall be sufficient warrant for the detention of the parolee or conditional releasee. The probation and parole officer, after making an arrest, shall present to the detaining authorities a similar statement of the circumstances of violation.

(c) Pending hearing, as provided in subsections (2) and (3), upon any charge of violation the prisoner may, if circumstances warrant, be incarcerated in the institution.

(2) (a) After the arrest of the prisoner, a hearing shall be held within a reasonable time, unless the hearing is waived by the parolee, to determine whether there is probable cause or reasonable grounds to believe that the arrested parolee has committed acts which would constitute a violation of parole conditions. An independent officer, who need not be a judicial officer, must preside over the hearing. The hearing must be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest. The parolee must be given notice of the hearing and must be allowed to appear and speak in his own behalf and introduce relevant information to the hearings officer.

(b) The hearings officer shall make a summary of what transpires at the hearing in terms of the responses and position of the parolee and the substance of the documents or evidence given in support of parole revocation. Based on the information given to him, the hearings officer shall determine whether there is probable cause to hold the parolee for the final decision of the board of pardons as provided in subsection (3).

(3) (a) If the hearings officer determines that there is probable cause to believe that the prisoner has violated a condition of his parole, the probation and parole officer shall immediately notify the board and shall submit in writing a report showing in what manner the prisoner has violated the conditions of release. This report shall be accompanied by the findings of the hearings officer.

(b) Thereupon, the board shall cause the prisoner to be promptly brought before it for a hearing on the violation charged under such rules as the board may adopt. If the violation is established, the board may continue or revoke the parole or conditional release or enter such other order as it may see fit.

(c) If it appears that he has violated the provisions of his release, the board shall determine whether the time from the issuing of the warrant

to the date of his arrest or any part of it will be counted as time served under the sentence.

(4) A prisoner for whose return a warrant has been issued shall, after the issuance of the warrant, if it is found that the warrant cannot be served, be considered a fugitive or to have fled from justice.

**History:** En. Sec. 18, Ch. 153, L. 1955; Sec. 94-9838, R. C. M. 1947; amd. Sec. 1, Ch. 140, L. 1973; redes. 95-3220 by Sec. 29, Ch. 513, L. 1973; amd. and redes. 95-3308 by Sec. 13, Ch. 333, L. 1975; amd. Sec. 63, Ch. 184, L. 1977.

#### Amendments

The 1973 amendment substituted "may, if circumstances warrant, be" for "shall remain" in the last sentence of the first paragraph; inserted the second and third paragraphs; substituted the present first sentence of the fourth paragraph for the former sentence; and deleted "or upon an arrest by a warrant as herein provided," from the beginning of the second sentence in the fourth paragraph.

The 1975 amendment renumbered this section; divided the section into subsections; substituted "department" for "board" in subsection (1); and deleted "by the board" after "has been issued" in subsection (4).

The 1977 amendment redesignated the first paragraph of former subsection (3) as subdivision (2)(b); redesignated the former second sentence of subsection (4) as subdivision (3)(c); and made minor changes in phraseology, punctuation and style.

#### Repealing Clause

Section 64 of Ch. 184, Laws 1977 read "Sections 16-2615, 16-3403, 95-103 through 95-108, 95-2211, and 95-3233, R. C. M. 1947, are repealed."

#### Admissibility of Suppressed Evidence

Evidence of drugs seized in a search conducted under a defective warrant, although not admissible in prosecution for possession of the drugs, was properly considered in hearing on revocation of parole. *State v. Thorsness*, — M —, 528 P 2d 692.

#### Appointment of Counsel Not Required

Under this section, parole violator is required to be brought before board for hearing, but court hearing is not required; parole violator does not have constitutional right but has statutory right to an attorney at parole revocation hearing, and board is not required to furnish parolee an attorney during such hearing. *Petition of Wing*, 154 M 501, 464 P 2d 302.

#### Promptness of Hearing

Where five-month delay by parole board was seemingly caused by parolee being in hospital, requirement under this section that hearing be "prompt" was not violated. *Petition of Spurlock*, 153 M 475, 458 P 2d 80.

**95-3309. Cases of juveniles excluded.** The provisions of this chapter shall not apply to probation in the juvenile court or to parole from state institutions for juveniles.

**History:** En. 95-3309 by Sec. 14, Ch. 333, L. 1975.

#### Repealing Clause

Section 17 of Ch. 333, Laws 1975 read

"Sections 95-3207, 95-3211, 95-3212, and 95-3219, R. C. M. 1947, are repealed."



# REVISED CODES OF MONTANA

## VOLUME 9 1977 Cumulative Supplement

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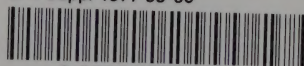
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